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08-44 No. ___

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IN THE

Supreme Court of the United States

IN RE: THE MARRIAGE OF
DEBORAH ORLANDO COONEY, F/K/A ORLANDO,
Petitioner,

v.

LORENZO ORLANDO,
Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, Second District

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state court rule violates the Due Process Clause of the Fourteenth Amendment where the rule precludes the court from exercising its discretion, in the interest of fundamental fairness, to allow an untimely appeal from a court order terminating a parent's liberty interest to the care and custody of her child.

2. Whether a state court rule violates the Due Process Clause of the Fourteenth Amendment "as applied" to the Petitioner Deborah Orlando Cooney where the rule precludes the court from exercising its discretion, in the interest of fundamental fairness, to allow an untimely appeal from a court order terminating her liberty interest to the care and custody of her child.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all the parties appearing here and before the Appellate Court of Illinois, Second District.

The Petitioner here and Appellant below is Deborah Orlando Cooney.

The Respondent here and Appellee below is Lorenzo Orlando.

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IN THE

Supreme Court of the United States

No. 07-__

IN RE: THE MARRIAGE OF
DEBORAH ORLANDO COONEY, F/K/A ORLANDO,
Petitioner,

v.

LORENZO ORLANDO,
Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, Second District

PETITION FOR A WRIT OF CERTIORARI

DECISIONS BELOW

The order of the Supreme Court of Illinois denying leave to appeal is reprinted in the Appendix. ("Pet. App.") at 188a. The unpublished opinion of the Appellate Court of Illinois, Second District is reprinted in the Appendix to the Petition. Pet. App. at 92a-141a. The order of appellate court denying Petitioner's motion for rehearing is reprinted in the Appendix. Pet. App. at 160a. The memorandum and decision of the circuit court of Winnebago County, Illinois entered June 20, 2007 is unpublished and reprinted in the Appendix. Pet. App. at 5a-15a.

JURISDICTION

The Appellate Court of Illinois, Second District entered its order on January 7, 2008. On April 9, 2008, the Illinois Supreme Court denied Petitioner's petition for leave to appeal. Pet. App. at 188a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

28 U.S.C. § 2403(b) may apply, as the constitutionality of Illinois Supreme Court Rule 306 is drawn into question. Pursuant to United States Supreme Court Rule 29.4, the Attorney General of Illinois has been served with this petition.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment provides, in relevant part: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

The relevant provisions the Illinois Supreme Court Rules (Ill. Sup. Ct. R. 306) are reprinted in the Appendix. Pet. App. at 189a-196a.

STATEMENT OF THE CASE

This petition seeks review of a decision of the Appellate Court of Illinois, Second District, from which the Supreme Court of Illinois denied leave to appeal. The important federal question is a parent's basic fundamental rights under the Fourteenth

Amendment. At issue is a state court rule which precludes a reviewing court from exercising its discretion, in the interest of fundamental fairness, to allow an untimely appeal from a court order terminating a parent's liberty interest to the care and custody of her children.

This Court's intervention is required, as several state courts of last resort have decided this important federal question differently and are in conflict.

A. Factual Background.

On June 15, 1998, the circuit court of Winnebago County, Illinois, granted a divorce to the Petitioner Deborah Orlando Cooney ("Deborah") and the Respondent Lorenzo Orlando ("Lorenzo"). Pet. App. at 94a. Two sons had been born to the marriage. On September 18, 2001, the circuit court issued the final judgment on custody, granting permanent custody to Deborah with visitation for Lorenzo pursuant to a previously entered co-parenting agreement. Pet. App. at 94a. The boys were then 11 and 9 years of age.

On June 14, 2005, the circuit court, in the presence of the parties' attorneys, received the report of a custody investigator, previously appointed pursuant to 750 ILCS 5/605. Pet. App. at 99a. The circuit court then entered a protective order, directing the attorneys not to disclose or discuss the contents of the Report with their clients and ordering both parents and children to be present in court the next day without explanation for the mandate. Pet. App. at 99a-100a.

On June 15, 2005, Lorenzo filed an emergency petition for a temporary change in custody, ostensibly based on the conclusions and recommendations of the investigator's report which, in part, recognized that

Deborah had been the boys' primary caregiver since their births. Deborah was then allowed to read the 33-page report while in court, although the governing statute required the receipt of such reports by the parties at least ten (10) days prior to any hearing. Pet. App. at 100a.

The circuit court granted Respondent Lorenzo's emergency petition for a temporary change of custody which provided that the children have "no contact" with Deborah. Deborah's counsel never informed her of the need to file an appeal of the custody determination within five (5) business days, pursuant to Ill. Sup. Ct. R. 306(b). Pet. App. at 149a. On the day of the appeal deadline, Deborah's attorney served her with his motion to withdraw. Pet. App. at 149a. Deborah subsequently filed an appeal; however, it was deemed untimely. Pet. App. at 120a. As a result of the circuit court's grant of custody to Lorenzo, Deborah was denied visitation with her children for almost two years, prior a formal custody hearing.

In June 2007 – after nearly two years of Deborah having no contact with her children – the circuit court conducted a custody hearing. On June 20, 2007, the circuit court entered a memorandum of decision formally denying Deborah visitation with her children. Pet. App. at 111a. On July 31, 2007, Deborah appealed the circuit court's decision. Pet. App. at 18a.

The appellate court reversed in part and affirmed in part the trial court's ruling, dismissing the heart of Deborah's argument that the patent violation of her due process rights on June 15, 2005 tainted the outcome of the final custody proceeding in 2007. The court stated, "we need not reach the merits of this argument. . . " Pet. App. at 119a. The appellate

court rested its conclusions on Ill. Sup. Ct. R. 306(b)(1), which required that a petition for leave to appeal an order affecting the care and custody of unemancipated minors must be filed within five (5) business days of the entry of the order, and that Deborah failed meet that deadline. Pet. App. at 119a-120a.

This constitutional issue arose for the first time in and as a result of the appellate court's ruling. Pet. App. at 164a-165a. Accordingly, Deborah raised this issue in her motion for rehearing in the appellate court, but the appellate court denied Deborah's motion without comment.

Thereafter, Deborah filed a petition for leave to appeal to the Illinois Supreme Court. In her petition, Deborah argued the unconstitutionality of the rigid application of Ill. Sup. Ct. R. 306(b)(1) stating that the rule: (1) was unconstitutional as it denied Deborah her due process rights under the Fourteenth Amendment as to the care and custody of her children; and (2) was unconstitutional "as applied" to her under the circumstances. Pet. App. at 165a. However, the Illinois Supreme Court denied Deborah's petition for leave to appeal without comment. Pet. App. at 188a.

B. Proceedings Below

On June 15, 2005, the trial court granted Respondent Lorenzo's emergency petition for a temporary change of custody which provided that the children have "no contact" with Deborah. Pursuant to Ill. Sup. Ct. R. 306(a)(5), Deborah filed a petition for leave to appeal the trial court's order granting a temporary change of custody and the no contact order. However, Deborah's counsel failed to timely perfect the appeal. Pet. App. at 119a-120a.

In June 20, 2007, the circuit court of Winnebago County, Illinois entered a Memorandum of Decision formally denying Deborah visitation with her children. Pet. App. at 111a. On July 31, 2007, Deborah appealed the circuit court's decision. Pet. App. at 18a.

The Illinois Appellate Court, Second District issued an order on January 7, 2008, affirming in part, reversing in part and remanding the cause. Pet. App. at 141a. Deborah's petition for rehearing was denied by the appellate court on February 8, 2008. Pet. App. at 160a.

On April 9, 2008, the Illinois Supreme Court denied Deborah's petition for leave to appeal. Pet. App. at 188a.

REASONS FOR GRANTING THE PETITION

I. PARENTS HAVE A FUNDAMENTAL LIBERTY INTEREST IN THE CARE AND CUSTODY OF THEIR CHILDREN.

This Court has recognized parents' fundamental rights to the care, custody and control of their children: "The liberty interest . . . of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). This Court described the rights of a mother "to the care, custody, management and companionship of her minor children" as "[r]ights far more precious . . . than property rights." The right to conceive and to raise children has been deemed "essential." *Stanley v. Illinois*, 405 U.S. 645, 651 (1972), *citing Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), and has been deemed a "basic civil right of

man." *Stanley*, 405 U.S. at 651, *citing Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

"The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment (*Meyer*, 262 U.S. at 399), the Equal Protection Clause of the Fourteenth Amendment, (*Skinner* 316 U.S. at 541), and the Ninth Amendment (*Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring))." *Stanley*, 405 U.S. at 651.

But, as this Court has noted: "For all its consequence, 'Due process' has never been, and perhaps can never be, precisely defined. '[U]nlike some legal rules,' this Court has said, due process 'is not a technical conception with a fixed content unrelated to time, place and circumstances.'" *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961), *quoting*, *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162-163 (1951).

"Rather, the phrase expresses the requirement of 'fundamental fairness,' a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake." *Lassiter v. Department of Social Services of Durham County, N.C.*, 452 U.S. 18, 24 (1981).

In this case, Deborah's liberty interests with respect to her care, treatment and custody of her minor children are fundamental liberty rights that are afforded constitutional due process protections.

II. SEVERAL STATE COURTS OF LAST RESORT HAVE DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE DECISIONS OF OTHER STATE COURTS OF LAST RESORT.

A. State Courts that Allow Untimely Appeals in the Interest of Fundamental Fairness.

Several state courts of last resort have allowed untimely appeals in the interest of fundamental fairness.

Oklahoma: In a divorce case seeking a modification of custody, the Supreme Court of Oklahoma found that "rigid adherence" to a procedural rule was a "particularly egregious abuse of discretion." *White v. White*, 173 P.3d. 78, 80 (Okla. 2007). The Oklahoma Court concluded, "A request for modification of child custody is far too important to be decided essentially by default under the Rules for the District Courts. Those rules were established to facilitate the adjudication of civil disputes, not to impede the presentation of evidence in a child custody dispute." *Id.* at 81.

West Virginia: The Supreme Court of West Virginia, in a divorce case where an attorney failed to file a petition for review within a ten-day deadline, wrote, "This Court said that 'it is generally held that an attorney's negligence will not serve as a basis for setting aside a default judgment on the grounds of 'excusable neglect.'" *Delapp v. Delapp*, 584 S.E.2d 899, 904 (W.Va. 2003). However, the West Virginia court looked to this Court's holding in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993) which found that

"excusable neglect" encompasses situations in which the failure to comply with a filing deadline is attributable to negligence. *Delapp*, 584 S.E.2d at 904, citing, *Pioneer*, 507 U.S. at 394. Following this Court's holding in *Pioneer*, the West Virginia Supreme Court found "excusable neglect" and reversed and remanded the case for review. *Delapp* 584 S.E.2d at 904.

Kansas: In *State v. Ortiz*, the Supreme Court of Kansas, in the interest of fundamental fairness, recognized an exception to the rule conferring jurisdiction on the appellate court only if a timely appeal is perfected, where a criminal defendant either was not informed of his right to appeal or where his attorney failed to perfect and complete an appeal. 640 P.2d 1255, 1258 (Kan. 1982). *In re T.M.C.* extended the fundamental fairness exception as explained in *Ortiz* to civil proceedings – specifically to civil proceedings involving the termination of parental rights. 988 P.2d 241, 244 (Kan.App. 1999). The court stated: "It is well-settled that basic parental rights are fundamental rights protected by the Fourteenth Amendment," and the court held "we conclude it is proper to apply the fundamental fairness exception to an untimely appeal from a termination order." *Id.* at 243.

Utah: In *State v. Johnson*, the Supreme Court of Utah held that an attorney's failure to perfect an appeal was grounds for allowing the appellate court to take jurisdiction over what would otherwise have been an untimely appeal. 635 P.2d 36, 38 (Utah 1981). Thereafter, in *Manning v. State*, the Utah Supreme Court set forth circumstances in which the court could reinstate the time frame for filing an appeal. 122 P.3d 628, 636 (Utah 2005). One such circumstance is where "the court or the defendant's

attorney failed to properly advise defendant of the right to appeal." *Id.*, at 636. The *Manning* court concluded that "the right to appeal may then be restored if it is in the interest of fundamental fairness to do so." *Id.*, at 639.

Arkansas: In *Bryant v. State*, the Supreme Court of Arkansas set forth two possible grounds for allowing the filing of an untimely appeal, where "either the party or attorney filing the appeal is at fault, or there is good reason that the appeal was not timely perfected." 207 S.W.3d 557, 557 (Ark. 2005). In *Bryant*, the attorney filed a motion in which he "candidly admitted fault," and therefore the court allowed the untimely appeal. *Id.*, at 557; *see, also*, *Smith v. Arkansas Dept. of Health & Human Services*, No. 07-1066, 371 Ark. 425, 2007 WL 3197222 (Ark. Nov. 1, 2007) (a termination of parental rights case in which the court allowed an untimely appeal even though the notice of appeal was deficient).

Vermont: The Supreme Court of Vermont, in a case involving the termination of parental rights and an untimely appeal, wrote: "Considering the important rights at stake in this case, the reasons for the mother's untimely appeal, and the fact that the parties have argued the merits of mother's appeal in their briefs, we address the substance of mother's appeal to advance the interests of justice and fundamental fairness." *In re A.D.T.*, 817 A.2d 20, 25 (Vt. 2002).

B. State Courts that Preclude the Court From Exercising Discretion to allow Untimely Appeals.

Minnesota: The Supreme Court of Minnesota, in a case involving the termination of parental rights

where an attorney failed to serve a notice of appeal on a party within 30 days as required by statute, did not excuse the error. The majority wrote: "A good cause exception at the appellate court level would eviscerate the uniform, impartial application of the rules. The rules as a whole are replete with provisions containing definite deadlines specifically 'designed to expedite the final resolution of litigation, with due consideration to fairness and certainty of procedure.'" *In the Matter of J.R.*, 655 N.W.2d 1, 4 (Minn. 2003). Two justices, while concurring in the result, dissented in part, saying: "There are times when we must be able to look beyond procedural rules in order to act in the interests of justice." *Id.* at 6. (Justices Anderson and Page dissenting in part).

Hawaii: The Supreme Court of Hawaii strictly adhered to a twenty-day filing rule in dismissing a mother's appeal of a decision awarding permanent custody of her child to a state agency. *In the Interest of Jane Doe*, 100 P.3d 75 (Haw. 2004). Indeed, the Hawaii Supreme Court took that opportunity to overrule it's own decision in *In re Doe*, 91 P.3d 485 (Haw. 2004) made earlier that same year. The Supreme Court of Hawaii stated: "Consequently, we overrule the jurisdictional holding of *In re John Doe*, reaffirm that a timely motion for reconsideration is a prerequisite to an appeal . . . and hold that, absent compliance with the statute, we lack jurisdiction, and the appeal must be dismissed." *In the Interest of Jane Doe*, 100 P.3d at 77.

Illinois: Pursuant to Ill. Sup. Ct. R. 306(a)(5), a party is permitted to file a petition for leave to appeal a temporary change of custody. *See*, Ill. Sup.Ct. R. 306(a)(5). The timing in which to file such a petition is governed by Ill. Sup. Ct. R. 306(b)(1) which pro-

vides, in relevant part: "The petition, supporting record and the petitioner's legal memorandum, if any, shall be filed in the appellate court within five business days of the entry or denial of the order from which review is being sought. . ." Ill. Sup.Ct. R. 306(b)(1). Furthermore, under Illinois law, a temporary custody order can only be appealed on an interlocutory basis as provided for in the Illinois supreme court rules. *In re Marriage of Kostusik*, 361 Ill.App.3d 103, 108 (Ill.App. Dist. 2005).

C. State Courts that Allow Untimely Appeals in Criminal, but Not Civil Cases.

Illinois: In Illinois, the court has the power to allow a late notice of appeal in criminal cases. *People v. Golden*, 369 Ill.App.3d 639, 645 (Ill. App. Dist. 2006). A late notice of appeal may be filed in a criminal case in Illinois "to promote the concept of fundamental fairness." *People v. Perez*, 115 Ill.App. 3d 446, 451 (Ill. App. Dist. 1983).

Unlike criminal cases, Illinois state courts have no discretion to allow untimely filed appeals in civil cases, including cases that affect a parent's fundamental right to the care and custody of her children. Ill. Sup. Ct. R. 306 provides that an appeal from an order concerning the care and custody of minors must be filed with appellate court within five (5) business days, rather than the usual thirty (30) day deadline to appeal other final orders. *See* Ill. Sup. Ct. R. 306(b)(1). Thus, in Illinois there is a dichotomy in allowing appeals in criminal but not civil cases, even though fundamental liberty interests are at issue in both criminal cases and in civil cases terminating parental rights.

D. The Federal Courts And State Courts Allow For Extensions Due to Excusable Neglect.

Federal Rule of Appellate Procedure 4(a)(5) permits the district court to extend the time for filing an appeal in a civil case if the party seeking the extension shows excusable neglect or good cause. Fed. R. App. P. 4(a)(5)(ii). A party may make a motion for an extension before the time for appeal has run or within a thirty-day grace period after the time for appeal has expired. Fed. R. App. P. 4(a)(5)(i).

The good cause standard applies in situations where the delay was not due to fault, excusable or otherwise. Traditionally, the excusable neglect standard is applied in situations where there is fault or the delay is within the control of the movant.

This Court in *Pioneer Investment Services v. Brunswick Associates* moved beyond the "excusable neglect" standard and adopted a "flexible standard" that takes into account all of the relevant circumstances. 507 U.S. 380, 395 (1993). Such circumstances include: "the danger of prejudice to [the nonmoving party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Id.* at 395. This Court held that "excusable neglect is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence." *Id.* at 394. Furthermore, the determination of whether failure to abide by a specified time limit constitutes excusable neglect is an equitable one. *Id.* at 395.

Although *Pioneer* was based on bankruptcy law, its excusable neglect standard has been adopted by a majority of the federal circuits as the proper standard for district courts to apply when exercising discretion of whether to extend the time to appeal a civil case under Rule 4(a)(5).[1]

Moreover, several states have enacted rules that are similar to Rule 4(a)(5) and allow the trial court to extend the time for appeal under a showing of excusable neglect.[2] Furthermore, Colorado allows its appellate courts to extend the time for appeal (Colo. R. App. P. 4(a)), while Pennsylvania allows late appeals in instances of non-negligence. *Bass v. Commonwealth*, 401 A.2d 1133, 1135 (Pa. 1979).

E. This Court Must Intervene In Order To Address The Conflict Among Courts of Last Resort Concerning This Fundamental Federal Question.

In this instance, the federal courts and numerous state courts allow for untimely appeals under the rubric of excusable neglect. The rule in Illinois that

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[1] *See, e.g., Halicki v. Louisiana Casino Cruises, Inc.*, 151 F.3d 465, 469 (5th Cir.1998); *Prizevoits v. Indiana Bell Tel. Co.*, 76 F.3d 132, 134 (7th Cir. 1996); *Thompson v. E.I. Dupont de Nemours & Co.*, 76 F.3d 530, 533 (4th Cir. 1996); *Advance Estimating Sys., Inc. v. Riney*, 130 F.3d 996, 997-98 (11th Cir. 1996); *Virella-Nieves v. Briggs & Stratton Corp.*, 53 F.3d 451, 454 (1st Cir. 1995); *Fink v. Union Cent. Life Ins. Co.*, 65 F.3d 722, 724 (8th Cir. 1995); *Reynolds v. Wagner*, 55 F.3d 1426, 1429 (9th Cir. 1995); *Weinstock v. Cleary*, 16 F.3d 501, 503 (2d Cir. 1994); *City of Chanute v. Williams Natural Gas Co.*, 31 F.3d 1041, 1046 (10th Cir. 1994).

[2] *See, e.g.*, D.C. Ct App. R. 4(a)(4); Haw. R. App. P. 4(a)(5); Me. R. App. P. 2(b)(3); Miss. R. App. P. 4(g); Mont. R. App. P. 4(6); N.M. R. App. P. 12-201(E)(2); N.D. R. App. P. 4(a); R.I. Sup.Ct. Art. 1, R. 4(a); Utah R. App. P. 4(e); Vt. R. App. P. 4.

precludes a court from exercising discretion to hear an untimely appeal violates parents' fundamental rights with respect to the care and custody of their children, and the rule is in conflict with numerous other jurisdictions. Although a parent may have a civil suit against her attorney for failing to perfect an appeal, an action for attorney malpractice is a wholly inadequate remedy for the violation of a fundamental liberty interest.[3]

Just as this Court in *Pioneer* adopted a "flexible standard" that takes into account all of the relevant circumstances, this Court should extend this flexible standard to state courts when the termination of parental rights is at issue. Illinois' rigid approach violates the Petitioner's constitutional rights and must be remedied.

III. ILLINOIS SUPREME COURT RULE 306(b)(1) IS UNCONSTITUTIONAL "AS APPLIED" TO DEBORAH, AS IT INTERFERED WITH HER FUNDAMENTAL LIBERTY RIGHT IN THE CARE AND CUSTODY OF HER CHILDREN.

When a litigant claims that a statute is unconstitutional "as applied" to her, and the statute is in fact

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[3] *See In re AK.V.*, 747 A.2d 570, 576-77 (D.C. 2000) (stating that the usual remedy of money damages in a civil case for misfeasance or nonfeasance of counsel is "wholly inadequate in a neglect case"); *In re K.L.*, 91 S.W.3d 1, 11 (Tex. Ct. App. 2002) (stating that money damages are inadequate in termination cases where the effect of counsel's deficiencies may be irrevocable). In presenting its holding, the court in *K.L.* cited to *Santosky v. Kramer*, 455 U.S. 745, 759 (1982) for the proposition that termination of parental rights cases differ from other civil cases in that once affirmed, the result is final and irrevocable. *K.L.*, 91 S.W.3d at 11.

unconstitutional as applied, the Court normally invalidates the statute only as applied to the litigant in question. *U.S. v. Booker*, 543 U.S. 220, 314 (2005). The Court does not strike down the statute on its face. *Id.*

In *Troxel v. Granville, supra*, this Court held a Washington state statute unconstitutional "as applied" in that the statute allowed the state court to infringe upon a parent's fundamental right to make child-rearing decisions by ordering visitation to a non-parent. This Court stated that "[t]he liberty interest in this case – the interest of parents in the care, custody, and control of their children – is perhaps the oldest of the fundamental liberty interests recognized by this Court." 530 U.S. at 65-66. This Court went on to rule that the combination of several factors "compels our conclusion that [the Washington statute], as applied, exceeded the bounds of the Due Process Clause." *Id.* at 65-69.

An analogous case is *Lulay v. Lulay*, 739 N.E.2d 521 (Ill. 2000), in which the Illinois Supreme Court found section 607(b)(1) of the Illinois Marriage and Dissolution of Marriage Act unconstitutional as applied to the facts of that case, as it was an unconstitutional infringement on the parents' fundamental liberty interest in raising their children. 739 N.E.2d at 534.

Looking at the specific facts of this case, Ill. Sup. Ct. R. 306(b) is unconstitutional as applied to Deborah, as it infringed on her fundamental liberty interest in the care and custody of her children.

On June 15, 2005, without a hearing and in violation of Illinois law, the trial court granted Lorenzo's emergency petition for a temporary change

of custody, further providing that there be "no contact" with Deborah, even though she had been the children's primary caretaker since their births. Pursuant to Ill. Sup. Ct. R. 306(a)(5), Deborah was permitted to file a petition for leave to appeal the temporary change of custody and the no contact order. The timing in which to file her petition was governed by Ill. Sup. Ct. R. 306(b)(1) which provides, in relevant part: "The petition, supporting record and the petitioner's legal memorandum, if any, shall be filed in the appellate court within five business days of the entry or denial of the order from which review is being sought . . ." Thus, pursuant to Ill. Sup. Ct. R. 306(b)(1), Deborah's petition for leave to appeal was to be filed in the appellate court on or before June 22, 2005. However, Deborah's counsel, Mr. Alex Abate, failed to timely perfect the appeal. Pet. App. at 119a-120a.

Instead, on June 22, 2005 – the day the petition for leave to appeal was due – Mr. Abate served Deborah with his Motion to Withdraw as Deborah's counsel. One week after the appeal deadline – on June 29, 2005 – Mr. Abate filed his Motion to Withdraw, which the trial court granted on that same day. Pet. App. at 149a.

In granting Lorenzo's emergency petition for a temporary change in custody and entering the no contact order, the circuit court clearly erred in taking Deborah's children away without any notice, hearing or findings whatsoever. Even the appellate court noted that no testimony or evidence was taken at the June 15, 2005 "hearing." Pet. App. at 100a. Fundamental fairness dictates the reinstatement of Deborah's right to appeal the order and its resulting impact on the subsequent June 2007 hearing, as such

a rigid application of Ill. Sup. Ct. R. 306(b)(1) is unconstitutional as applied to Deborah under these circumstances.

CONCLUSION

For the reasons stated, the Court should grant this petition.

Respectfully submitted,

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July 8, 2008

APPENDIX A

STATE OF ILLINOIS IN THE CIRCUIT COURT
OF THE 17TH JUDICIAL CIRCUIT COUNTY
OF WINNEBAGO

[Filed 9/18/01]

No. 93 D 1332

IN RE THE MARRIAGE OF: DEBORAH A. ORLANDO,
Plaintiff,

v.

LORENZO ORLANDO,
Defendant.

JUDGMENT ON REMAINING ISSUES

THIS CAUSE having previously come before the Court for hearing on the Petition for Dissolution of Marriage and Response thereto, both parties being present in open Court and by through their respective attorneys, ALEX ABATE for the plaintiff and DANIEL J. CAIN, for the defendant, the Court being fully advised in the premises hereby finds and orders as follows:

1. This Court has jurisdiction of the parties and the subject matter hereof.

2. The parties have previously been awarded a Judgment for Dissolution of their Marriage and the marriage has been dissolved by entry of a Judgment for Dissolution of Marriage Order on June 15, 1998.

3. The plaintiff resides in Chicago, Illinois, and is employed full time as a registered nurse.

4. The defendant resides in Rockford, Illinois and is employed full time at IMTA Inc.

5. Two children were born as a result of the marriage, namely, Christopher born on September 22, 1989 and Jonathan born on December 29, 1991.

6. The parties hereto have previously entered into a joint parenting agreement, which agreement is made a part of this Judgment on Remaining Issues.

7. Each of the parties are barred from receiving maintenance, each from the other.

8. The defendant shall pay the sum of $600.00 per month to plaintiff pursuant to a Notice of Withholding as and for child support. The defendant is not required to contribute to private school tuition expenses for the minor children.

9. The Court finds that it was not clear from the evidence presented in Court that there was an arrearage in child support, and therefore, the Court does not strike an arrearage in child support.

10. The defendant shall continue to cover the minor children on his group health insurance plan, and if available to the plaintiff, the plaintiff shall cover the children under health/dental programs as secondary coverage. Any uncovered health care expense for the minor children shall be equally divided between the parties hereto.

11. Each party is allowed to claim one child as a dependent for income tax purposes, with the plaintiff claiming Christopher and the defendant claiming Jonathan. Such Order shall be in effect for the year 2000 and subsequent years.

12. With respect to the division of marital assets, the parties are awarded the following assets:

A) The plaintiff shall receive as her assets any personalty in her possession, her vehicles subject to any indebtedness thereon, and any retirement benefits in her name only.

B) The defendant shall receive as his assets any personalty in his possession, his jeep subject to the indebtedness thereon and the former marital residence.

C) The plaintiff shall by quit-claim deed transfer any and all interest she has in the parties former marital residence to the defendant within thirty days of the entry of this Order.

D) The defendant shall be specifically responsible for the following debts against the home: the first mortgage, the Aldoni judgment, the Orlando judgment, and 1/2 of the Wietrzykowski judgment. Once the defendant pays his 1/2 of the principal and interest of the Wietrzykowski judgment, said lien shall be released from the realty.

E) The defendant shall further receive any retirement benefits in his name (this is in consideration for the personalty which the plaintiff removed from the marital residence which included the defendant's non-marital property as set forth in defendant's exhibit I previously admitted into evidence)

F) The defendant shall receive the dissipated funds which were given to his parents from the Nicolosi escrow account.

G) Other than as heretofore indicated the parties are further ordered to be solely responsible

for any debts in their individual names and to hold the other party harmless on the collection of same. Such debts being incurred subsequent to their separation in 1994.

H) Each of the parties shall be responsible to pay for his or her own attorney's fees,

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS that the provisions of Paragraph 1 through 12 (A-H) above are hereby the Order of this Court, and the Court specifically reserves jurisdiction to ensure the enforcement of this Judgment Order.

Dated: 9/18/2001 Enter:_____//s_____
JUDGE STEVEN NORDQUIST

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STATE OF ILLINOIS CIRCUIT COURT
SEVENTEENTH JUDICIAL CIRCUIT

[LOGO] FILED June 20, 2007

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IN RE: THE MARRIAGE OF

DEBORAH ORLANDO COONEY, f/k/a ORLANDO

and

LORENZO ORLANDO

Case No. 1993 D 1332

MEMORANDUM OF DECISION

Counsel:

INTRODUCTION

This case came on for hearing which commenced June 4, 2007 on the Counter-Petition for Change of Custody filed by the Respondent, Lorenzo Orlando. This Counter-Petition was filed November 19, 2001. When the judgement for dissolution of marriage was entered, sole custody of the parties' two minor children was awarded to Petitioner, Deborah Orlando Cooney. More than two years had elapsed from the time the judgement order awarded Petitioner sole custody and the filing of Respondent's Counter-Petition for Change of Custody. By court order dated June 15, 2005, pursuant to an Emergency Motion to Modify Custody, custody was transferred to the Respondent, Lorenzo Orlando. Custody of the two minor children has been with the Respondent, Lorenzo Orlando, since the entry of that order, June 15, 2005. The parties two minor children are Christopher Orlando who will be eighteen years of age in September, 2007 and Jonathan Orlando who will be sixteen years of age in December, 2007.

CUSTODY MODIFICATION

The court has considered the testimony of the witnesses, all exhibits which were offered and admitted into evidence and those pleadings for which the Court was asked to take judicial notice.

In considering the testimony of the witnesses, the Court can evaluate the temperament, personalities and demeanor of the witnesses. The Court found the Respondent, Lorenzo Orlando, to be a credible witness. He appeared through the Court's observa-

tions to testify truthfully. The Court found the Petitioner, Deborah Orlando Cooney, to be less credible. Her answers were often evasive and she appeared defensive. The Court found Petitioner's father, Dr. Raymond Wietrzykowski, to not be a credible witness. One illustration of this point was his testimony regarding his reason for stopping at the Logli Supermarket on East State Street in Rockford. (A convenient pit stop and good salad bar). There was no Court Order prohibiting Dr. Wietrzykowski from contacting the parties minor children at those times he stopped at Logli's Supermarket. The more credible explanation would have been that he, in fact, stopped at Logli's Supermarket for the purpose of visiting Christopher. The Court found all other witnesses to be credible and that they testified to the best of their knowledge and belief.

The Respondent, Lorenzo Orlando bears the burden of proving by clear and convincing evidence that a change has occurred in the circumstances of the child or his custodian and that the modification is necessary to serve the best interest of the children. The Court must first determine whether a change of circumstances exists as to warrant a review of the best interest issue. The Court does find that such a change of circumstances has been established. Specifically, both parties have remarried and Petitioner Deborah Orlando Cooney has a child with her present husband. The parties' minor children are now nearly eighteen years of age (Christopher) and fifteen and one half years of age (Jonathan). There is evidence that the Co-Parenting Agreement entered into between the parties on June 8, 1999 has not been complied with specifically with regard to certain provisions dealing with the areas of education, medical and health care and visitation as will be more

fully discussed below. Finally, subsequent to the original judgement order granting sole custody to Petitioner, custody was transferred to Respondent by Court Order dated June 15, 2005 which further provided that Petitioner was to have no contact or visitation with one of the parties minor children, Jonathan Orlando, until further Order of the Court.

The Court having determined that there has been a change in circumstances since the prior judgement must next evaluate whether a modification is necessary to serve the best interest of the children. The Court has considered all relevant factors, including those statutory factors set for in 750 ILCS 5/602.

As is often the case, the preference or the wishes of the parents as to custody is of little assistance to the Court. Each party wants to have custody of their minor children.

As to the wishes of the children as to their custodian, both Christopher Orlando and Jonathan Orlando were interviewed separately pursuant to 750 ILCS 5/604. All counsel and a court reporter were present for those interviews. The Court found both boys to be forthright, open and honest. Both boys were unequivocal in their preference and their desire to continue living with their father, the Respondent as their custodian. The Court believes their desire to continue to reside with their father is based upon reasons related to their best interest, including the following:

> The boys stated that they now had a good family and a good relationship with their father; that they felt safe; that life was now normal; that life when they were living with their mother was the opposite; that they were achieving good grades in

> school and that they were involved in activities at school, including sports; and that it would be insane to return their mother as custodian after years of abuse and neglect. Jonathon readily admitted in his interview that he got bad grades when he was residing with his mother. Christopher said that when he was living with his mother he was at every hospital and he thought he was going to die.

Based upon the boys' ages, maturity, and a sound basis for reasons for their desire to continue to reside with their father as their custodian, the Court gives serious weight to this factor.

As to the interaction and the interrelationship of the boys with their parents, siblings and any others who significantly affect the boys best interest, there was evidence that the boys engage in a number of activities with their father and his spouse including biking, bowling, hunting and scuba. There was evidence that the boys have a close relationship with their father and the boys felt that they could go to their father to talk. There was also evidence that the boys have a good relationship with Respondent's spouse, Laurie Orlando as well as Respondent's parents, the boys paternal grandparents whom they see on a frequent basis. Lorenzo Orlando readily admitted that he was neglectful of the boys when they were young and that his conduct was inappropriate. The Petitioner discussed her interaction and her interrelationship with the boys, which she described as relatively close. She discussed a typical day when she had sole custody of the boys including school, eating together as a family, making sure that homework was done, reading and talking. She also discussed the relationship between the boys and her

parents, their maternal grandparents, as very good and included activities of boating, camping trips and talking in general. There was no evidence adduced as to the interaction and the interrelationship between the boys and the Petitioner's present spouse, Edward Cooney. However there was evidence that their exited a good relationship between the boys and their step-sister, the daughter of the Petitioner with her present spouse.

Regarding the children's adjustment to their home, school and community, the Court finds that the boys have adjusted very well to their home and school since the transfer of custody on June 15, 2005. While Jonathon had some problems related to conduct and demerits during the first year after the transfer of custody, the 2005 -2006 school year, he seems to be doing very well in school this year. As previously mentioned, he is involved in sports and has obtained awards related to football. The Court further finds that Christopher is doing well in school since the time custody was transferred on June 15, 2005 with hardly any absences from school. He is also involved in extra-curricular activities including track. The boys adjustment in the home with their father has previously been discussed in considering an earlier factor.

As to the mental and physical health of all individuals involved, there was a tremendous amount of evidence presented at the time of trial on that subject. Both boys continue to counsel with Mr. Brian Klaung, a clinical social worker. He has also counseled with Lorenzo Orlando and his wife in family sessions. Mr. Brian Klaung testified that in his opinion the boys would be at risk if custody is returned to Petitioner, their mother. Specifically, he

testified his concerns include Christiopher feigning illness and that Jonathon would become enraged, act out and end up in the criminal justice system. Much was made throughout the trial as to whether Christopher's ailments were real or perceived by him and/or perceived by his mother, the Petitioner. The Court does not believe it necessary to determine from the testimony whether, in fact, Munchausen's or Munchausen's Syndrome by Proxy exits in making its custody determination. Dr. Jaffee and Dr. Rossiter are in disagreement on that point. However, the Court will note that it is significant that Christopher's doctor and hospital visits have decreased dramatically since the time custody was transferred to his father on June 15, 2005. It is also significant to this Court that when Petitioner disagreed or took exception to a doctor's diagnoses as to a medical condition of Christopher, she would seek out and consult other doctors. This situation occurred a number of times. Both boys appeared to this Court to be happy and healthy at the present time in their present situation.

As to physical violence or threat of physical violence by the children's potential custodian, their was evidence presented at trial regarding an incident between the Respondent and the Petitioner's present spouse, Edward Cooney. The Court would point out that this single incident involving Edward Cooney wherein Respondent is alleged to have grabbed Mr. Edward Cooney by the throat is remote in time and the Court places little significance on that incident. There were also allegations from Petitioner that during the course of the marriage, Respondent was often times verbally abusive toward her. Again, that verbal abuse is remote in time, when the parties were still married before 1999.

As to the occurrence of any on going abuse, there was evidence that the Respondent illegally taped phone conversations with the Petitioner. He was subsequently charged and plead guilty to a criminal offense of attempt eavesdropping. While that is a fact considered by the Court, it is not given significant weight as it pertains to the best interest of the children. There was also evidence that at the time of the incident between the Respondent and Mr. Edward Cooney, the Respondent had an Order of Protection against him. That fact is considered by the Court but not given significant weight as to the best interest of the children.

As to the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the children, there was little or no evidence produced at trial as to the willingness and ability of the Respondent, Lorenzo Orlando, to facilitate and encourage a close and continuous relationship between the Petitioner and the boys. There is credible evidence before the Court that Petitioner, when she was the sole custodian, unreasonably denied or attempted to deny visitation and frustrated visitation between the boys and the Respondent, Lorenzo Orlando. One example illustrating this point is the incident wherein Petitioner obtained an Order of Protection against the Respondent in Cook County on June 4, 2004, two days after the Court in Winnebago County entered an Order setting forth a summer visitation schedule on June 2, 2004. There is evidence in the record that Petitioner failed to comply with the co-parenting agreement beyond the visitation issues. Competent testimony was presented that she, as the custodial parent, did not promptly transmit to the Respondent information regarding the boys school activities, in-

cluding parent teacher meetings. When asked by her Counsel whether Respondent was advised of medical treatment rendered to the boys, specifically Christopher, Petitioner's answer was that he would get the EOB' s. Later she testified that she always notified the Respondent of the boy's medical treatment. The Court does not find that testimony credible in light of the fact that Respondent testified that he was not familiar with the names of the boys medical doctors, specifically their family doctor. There is also evidence in the record that the Petitioner alienated or attempted to alienate the boys from their father, the Respondent. One such incident involved an accusation by Petitioner that the Respondent had attempted to poison or kill Christopher. There is no doubt in this Court's mind that if custody was returned to her, the Petitioner would not facilitate or encourage a close and continuing relationship between the boys and the Respondent. In fact, she would do just the opposite.

Based upon all of the evidence in this case, the Court finds that it is in the best interest of Christopher Orlando and Jonathon Orlando that permanent custody be modified and the Court grants the Counter-Petition for Change of Custody. The physical custody of the children is awarded to the Respondent, Lorenzo Orlando.

VISITATION

As previously set forth, the Court conducted an interview of both boys in chambers separately, with all counsel and a court reporter present. During the course of that interview, the Court ascertained the wishes as to Christopher and Jonathan as to visitation. Specifically, Christopher and Jonathan were asked of their wishes as to visitation with their

mother if custody remained with their father. Again, both boys appeared to be open and honest with the Court. They did not appear the Court to be under any duress or stress. There was no indication to this Court that they had been coached or threatened in any way, shape or form. Both boys answered unequivocally that they did not want to see their mother.

A non-custodial parent is entitled to reasonable visitation rights unless the Court finds that visitation would endanger seriously the child's physical, mental, moral or emotional health. Mr. Brian Klaung testified that visitation should not occur between the boys and their mother until her delusional disorder is resolved. He testified that would require intensive psychotherapy with an expert in the area of delusional disorders which could take months or years. He further testified that the effect of any contact between the children and their mother without the Petitioner receiving the necessary treatment would include continued efforts on the part of the Petitioner to alienate the boys from their father, the Respondent. The Court believes that Petitioner would use visitation to attempt to alienate the boys from their father and that such conduct on the part of the Petitioner would endanger seriously the boys' mental and emotional health. Furthermore, in Mr. Klaung's opinion, contact with their mother would impair the treatment which the boys continue to receive. The Court believes that any impairment to the treatment which the boys continue to receive would endanger seriously their mental and emotional health. Mr. Klaung also testified that he wouldn't recommend supervised visitation because, in his opinion, no person could supervise visitation adequately, given the level of severity of abuse that has occurred

between the Petitioner and her children. From all the evidence presented in this case the Court finds that visitation at this time between the Petitioner and her children would endanger seriously the children's mental and emotional health. Visitation is denied until such time as the Petitioner successfully undergoes intensive psychotherapy and the boys have progressed in their counseling or treatment to the point that visitation would not seriously endanger their mental or emotional health.

CONCLUSION

The Court will prepare an Order Granting Respondent's Counter-Petition for Change of Custody which will incorporate this Decision as the Order of the Court. The Order will also release the transcripts of the minor interviews which were previously ordered sealed.

Sincerely,

_____//s_____

John R. Truitt
Associate Judge
17th Judicial Circuit

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT
WINNEBAGO COUNTY

[Filed 6/20/07]

Case No. 1993 D 1332

IN RE: THE MARRIAGE OF DEBORAH ORLANDO COONEY, A/K/A ORLANDO

and

LORENZO ORLANDO

ORDER

This matter came on for hearing on Respondent's Counter Petition for Change of Custody from June 4, 2007 through June 14, 2007, Petitioner, Deborah Orlando Cooney present throughout the hearing with counsel Attorney David Mokotoff and Attorney Stanley Kaplan, Respondent Lorenzo Orlando present and with counsel, Attorney Anne Vecchio and Attorney Janet Fuenty present as the child representative.

NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Respondent's Counter-Petition for Change of Custody is heard and granted.

2. That the Decision of this Court dated June 20, 2007 is incorporated as the Order of the Court.

3. That the transcripts of the interviews of Christopher Orlando and Jonathan Orlando previously ordered sealed, shall be released.

DATE: 6-20-07

ENTERED: _____//s_____
John R. Truitt,
Associate Judge

APPEAL TO THE APPELLATE COURT FROM THE CIRCUIT COURT OF WINNEBAGO COUNTY, ILLINOIS DOMESTIC RELATIONS DIVISION

[Filed 7/31/2007]

No: 93D1332

IN RE: THE MARRIAGE OF DEBORAH ORLANDO COONEY
Petitioner,

v.

LORENZO ORLANDO
Respondent.

NOTICE OF APPEAL

Petitioner, Deborah Orlando Cooney, by and through her undersigned attorney, Stanley F. Kaplan, of Stanley F. Kaplan, P.C. hereby appeals to the Appellate Court of Illinois, Second District, from the order entered on July 26, 2007, in the Circuit Court of Winnebago County, Illinois, Judge John R. Truitt presiding, denying the Petitioner's motion for rehearing and reconsideration of the order entered on the 20th day of June, 2007, granting the petition of Lorenzo Orlando for custody of the two minor children.

Dated: July 30, 2007

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APPENDIX B

THIS APPEAL INVOLVES A QUESTION OF CHILD CUSTODY, ADOPTION, TERMINATION OF PARENTAL RIGHTS OR OTHER MATTER AFFECTING THE BEST INTERESTS OF A CHILD

IN THE APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

[Filed September 25, 2007]

No. 2-07-0758

IN RE: THE MARRIAGE OF DEBORAH ORLANDO COONEY, F/K/A ORLANDO,

Petitioner-Appellant,

and

LORENZO ORLANDO,

Respondent-Appellee.

On Appeal from the Circuit Court of
Winnebago County, Illinois
Domestic Relations Division, 93 D 1332
The Honorable John R. Truitt, Judge Presiding

Judgment entered June 20, 2007
Order Denying Post-Trial Motion entered July 26, 2007
Notice of Appeal filed July 31, 2007

BRIEF OF PETITIONER-APPELLANT

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ORAL ARGUMENT REQUESTED

THIS APPEAL INVOLVES A QUESTION OF CHILD CUSTODY, ADOPTION TERMINATION OF PARENTAL RIGHTS OR OTHER MATTER AFFECTING THE BEST INTERESTS OF A CHILD

IN THE APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

[Filed 9/25/07]

No. 2-07-0758

IN RE: THE MARRIAGE OF DEBORAH ORLANDO COONEY, F/K/A ORLANDO,
Petitioner-Appellant,

and

LORENZO ORLANDO,
Respondent-Appellee.

On Appeal from the Circuit Court of
Winnebago County, Illinois
Domestic Relations Division, 93 D 1332
The Honorable John R. Truitt, Judge Presiding

Judgment entered June 20, 2007
Order Denying Post-Trial Motion entered July 26, 2007
Notice of Appeal filed July 31, 2007

BRIEF OF PETITIONER-APPELLANT

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NATURE OF THE CASE

Petitioner-Appellant Deborah Orlando Cooney ("Deborah") and Respondent-Appellee Lorenzo Orlando ("Lorenzo") were once married to each other. This matter arises out of the parties' divorce proceedings. In 1993, Deborah filed a Petition for Dissolution of Marriage in Winnebago County, Illinois; thus, initiating the underlying matter. In 1997, Deborah filed a Petition for Dissolution of Marriage in Cook County, and pursuant to an impending motion for voluntary dismissal of the underlying matter in Winnebago County (which was granted). Thereafter, Lorenzo filed a Counter-Petition for Dissolution of Marriage in the dismissed underlying matter, and a Motion to Reconsider the circuit court's grant of Deborah's voluntary dismissal. The circuit court reconsidered its order, denied Deborah's Motion for Voluntary Dismissal, and reinstated the matter. Thereafter, Deborah filed various motions to transfer the matter to the Cook County, but the circuit court denied transfer and Deborah withdrew the Cook County divorce petition.

Judgment for Dissolution of Marriage (dissolving the bonds of marriage) was entered in the underlying matter in 1998, with all remaining issues reserved. Temporary sole custody of the parties' two minor children was awarded to Deborah in 1999, pursuant to a co-parenting agreement. On September 18, 2001, judgment on permanent custody and the remaining financial issues was entered by the circuit court. That judgment was timely appealed.

While the judgment was on appeal, without leave of court Lorenzo filed a Counter-Petition for Change of Custody. The Counter-Petition was filed in November 2001, approximately 2 months after the

custody judgment. The appeal was subsequently withdrawn.

In 2004, the circuit court appointed an investigator to assist in its determination of custody. On June 15, 2005, Lorenzo filed a Petition for an Order of Protection against Deborah, and an Emergency Petition for Change in Custody. That day, without notice or hearing, the circuit court entered an Emergency Order of Protection against Deborah ("EOP"), and an emergency order modifying custody and awarding custody of the parties' minor children to Lorenzo.

Deborah filed motions to reconsider and vacate the EOP and emergency order modifying custody. Those motions were denied, and Deborah appealed the denial of her motions. The appeal was dismissed for lack of jurisdiction.

From June 2005 to December 2006, the circuit court entered 30 orders extending the EOP. In December 2006, the circuit court dismissed the Petition for an Order of Protection, and vacated the EOP entered June 15, 2005, but the court simultaneously entered an order banning Deborah from having any contact with her boys.

Following a lengthy trial, on June 20, 2007 the circuit court entered an order and Memorandum of Decision ("MOD") granting Lorenzo's Counter-Petition for Change of Custody; thus, modifying permanent child custody such that Lorenzo now has sole custody of the minor children. In that order, the circuit court also denied Deborah any visitation whatsoever with her two minor children. Deborah's post-trial motion was denied, and this appeal followed.

ISSUES PRESENTED FOR REVIEW

Whether Lorenzo's Counter-Petition for Change of Custody is a nullity.

Whether the circuit court erred in granting Lorenzo's Petition for an Order of Protection and entering an EOP against Deborah.

Whether the circuit court erred in repeatedly extending the EOP against Deborah.

Whether the circuit court erred in granting Lorenzo's Emergency Petition to Modify Custody and entering an Emergency Order transferring custody of the parties' minor children to Lorenzo.

Whether the circuit court applied the wrong standard at trial concerning custody. Whether the circuit court's findings at trial concerning custody were against the manifest weight of the evidence.

Whether the circuit court abused its discretion in entering judgment denying Deborah any visitation whatsoever with the parties' minor children.

Whether the circuit court erred in denying Deborah's Motion for Voluntary Dismissal.

Whether the circuit court erred in denying Deborah's motions to transfer venue to Cook County.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under Supreme Court Rule 303. On June 20, 2007, the circuit court entered judgment modifying permanent custody of the parties' minor children, and denying Deborah any visitation whatsoever with the children. On July 17, 2007, Deborah timely filed her post-trial motion. On July 26, 2007, the circuit court entered an order

denying Deborah's post-trial motion. On July 31, 2007, Deborah timely filed her notice of appeal.

STATEMENT OF FACTS

Deborah and Lorenzo were united in marriage in 1987 in Chicago, where they initially resided. However, Lorenzo's job required the family to relocate to Rockford sometime in 1989. Two children were born to the marriage: Christopher on September 22, 1989, and Jonathan on December 29, 1991. (Resp. Ex. 2, p. 3)

Deborah filed a Petition for Dissolution of Marriage in Winnebago County on November 17, 1993. (Vol. 1 of 6, R. C000001) The parties had separated in 1993 when Deborah discovered that Lorenzo was having an affair with a young woman. (Resp. Ex. 2, p.3) Lorenzo admitted that he had seriously neglected Deborah and the boys during the years they lived together. He attributed that conduct to his Italian background. (Resp. Ex. 2, p. 6)

Shortly after their separation, Deborah began a relationship with another person, Edward Cooney ("Edward"). Deborah and Edward had a child together, Caitlin, born in 1997. Deborah and Edward subsequently married in 1999. Over the years, Lorenzo went from one serious relationship to another: Deborah Steffen in 1993 and 1994, Linda Koeller between 1995 and 2000, and finally with his present wife, Laurie, whom he married in 2002. (Resp. Ex. 2, p. 3)

Throughout all this time, from the birth of their children until the Emergency Orders entered by Judge Nordquist on June 15, 2005 (Vol. 2 of 3, R.0000467, R.0000481), Deborah was the primary caretaker of the children. (Resp. Ex. 2, p. 3) Pursuant

to the EOP entered on that day. (Vol. 2 of 3, R. C000467), Deborah has had absolutely no contact with her children (Tr. R. 002166-002167)—not even supervised visitation—up to and after Judge Truitt's MOD (Vol. 5 of 5, R. C001009) granting Lorenzo's Counter-Petition for a Change of Custody which had been filed on November 19, 2001. (Vol. 6 of 6, R. C000987)

On June 15, 1998, in agreed upon bifurcated fashion, and based on Deborah's Petition, the circuit court granted dissolution of marriage, respecting the bonds themselves, without addressing other issues such as custody, maintenance and property distribution. (Vol. 5 of 6, R. C000876) Prior to that, on September 17, 1997, Deborah filed a Motion to Voluntarily Dismiss her Petition for Dissolution in Winnebago County. (Vol. 4 of 6, R. C000640) At that time she had been living with the children in Cook County since 1996. (Tr. R002124). The Motion was granted on September 18, 1997. (See, Para. 1 of Stipulation of the Parties, filed in this Appeal). In anticipation of that ruling, Deborah filed a Petition for Dissolution in Cook County on September 15, 1997. (Vol. 1 of 3, R. C000229; *see also* Cook County Petition, contained in Appellant's Supplemental Record). Attorneys for the parties filed appearances in that action pending in Cook County. (Vol. 5 of 6, R. C000798).

On September 22, 1997, Lorenzo filed a Counter-Petition for Dissolution in Winnebago County (Vol. 4 of 6, R. C000643) while Deborah's previously filed Petition was still pending in Cook County. On October 1, 1997, Lorenzo filed a Motion to Reconsider the circuit court's grant of the voluntary dismissal. (Vol. 4 of 6, R000698). On November 24, 1997, the

circuit court reconsidered its prior order granting the voluntary dismissal, and denied Deborah's Motion for Voluntary Dismissal. (See, Par. 2 Stipulation of the Parties, filed in this Appeal, and undated Order attached thereto).

On November 25, 1997, Deborah filed her Motion to Transfer Venue to Cook County for *forum non conveniens*. (Vol. 5 of 6, R. C000797) Deborah followed this up with a renewed Motion to Transfer (Vol. 1 of 3, R. C000157, C000177). However the circuit court denied transfer to Cook County. (Vol. 1 of 3, R. C000241). Deborah ultimately withdrew her petition for dissolution pending in Cook County.

In early 1994, Judge Grubb, pursuant to 750 ILCS 5/604(b), appointed Thomas Dudgeon, Ph.D., a clinical psychologist, to conduct a custody evaluation and to advise the court (Tr. R000187). Dr. Dudgeon's custody report was submitted on July 25, 1996. (Tr. R000187). His recommendation was that Deborah should be awarded sole custody of the children with appropriate visitation for Lorenzo. (Tr. R000227).

Previously, on January 26, 1996, Judge Grubb had conducted an *in camera* interview with Christopher who was then six years old. (Tx. R000050-59). *In camera* interviews with both boys, scheduled for June 17 and 18, 1998, were cancelled by Judge Nordquist. (Vol. 5 of 6, R. C000875). On June 8, 1999, Judge Nordquist, when the matter came on for status on custody, entered an order granting Deborah temporary sole custody of the boys subject to an attached co-parenting agreement of the parties. (Vol. 6 of 6, R. C000926). The coparenting agreement between the parties accompanied the order. (Vol. 6 of 6, R. C000918). On September 18, 2001, Judge Nordquist issued the final judgment on permanent

custody and the remaining issues in the case, which, *inter alia*, incorporated the co-parenting agreement and granted permanent custody of the children to Deborah. (Vol. 6 of 6, R. C000978). Deborah timely filed a Notice of Appeal of that judgment. (Vol. 6 of 6, R. C000981).

Prior to the Judgment for Dissolution in 1998 (Vol. 5 of 6, R. C000876) and the execution of the co-parenting agreement in 1999 (Vol. 6 of 6, R. C000198), matters had not proceeded smoothly between the parties. There were numerous court appearances dealing not only with custody and visitation but also with property matters, maintenance and attorney's fees. In his testimony, Lorenzo admitted to grabbing Edward by the neck sometime back in 1992 or 1993, while at Deborah's home to pick up the boys. (Tr. R002656, R002739-41) Lorenzo also admitted to trying to intimidate Edward by threats and harassing phone calls. (Resp. Ex. 2, p. 6). In 1994, Deborah charged Lorenzo with choking her and trying to push her out of his truck. He was acquitted of the charges by a jury when the State failed to prove them beyond a reasonable doubt. (Resp. Ex. 2, p. 6). And, on March 23, 1998, Lorenzo plead guilty to attempted eavesdropping on Deborah, a misdemeanor. Pursuant to plea negotiations, the charge had been dropped from the felony crime of eavesdropping for which he had been indicted. (Tr. R000169-178).

Deborah filed a Petition for Removal, pursuant to 750 ILCS 5/609, in order to move to Ohio with the boys. (Vol. 6 of 6, R. C000983). On November 19, 2001, Lorenzo filed his Response to the Petition for Removal and, without leave of court, a Counter-Petition for Change of Custody. (Vol. 6 of 6, R.

C000987). For a few years prior to that time, a reasonably stable schedule had evolved for the boys' visitation with Lorenzo in Rockford. This had occurred despite ongoing conflict between Deborah and Lorenzo over various matters especially those involving financial disputes. (Resp. Ex. 2, p. 3). Deborah's Petition for Removal was ultimately denied by the circuit court on August 29, 2002 (Vol. 1 of 3, R. C000037), pursuant to its Memorandum of Decision filed on August 5, 2002. (Vol. 1 of 3, R. C000029). However, Lorenzo's Counter-Petition for Change of Custody remained pending.

On October 17, 2002, Ms. Kathryn Bischoff, Esq., was appointed by the circuit court to act as the children's representative, pursuant to 750 ILCS 5/506(a)(3). (Vol 1 of 3, R. C000052). Ms. Bischoff was present for the *in camera* interview with Christopher on July 9, 2004. In that interview, Christopher painted a very negative picture of his relationship with his father. (Tr. R000551, *et. seq.*). However, Christopher was interviewed again on June 5, 2007 with Ms. Janet Fuenty (Ms. Bischoff's successor child's representative) being present. After a passage of two years without having any contact with his mother, Christopher now painted a very negative picture of his relationship with Deborah. (Tr. R002338, *et. seq.*).

On September 23, 2004, Lyle H. Rossiter, Jr., M.D., a forensic psychiatrist, was appointed by the circuit court to do an "evaluation," pursuant to 750 ILCS 5/605. (Vol. 2 of 3, R. C000375). The court order specifically states that "the standards set forth under Section 750 ILCS 5/605 apply to this order." (Vol. 2 of 3, R. C000376). That statute speaks of an "investigation and report, concerning custodial arrangements

for the child" which could be done by a child welfare agency approved by the Department of Children and Family Services. (See, Section 5/605(a)). This would seem to contemplate what is often referred to as a "home study."

Dr. Rossiter submitted a report dated June 10, 2005. The report was submitted into evidence at trial as "Resp. Ex. 2" (Tr. R002123). In that report, Dr. Rossiter made findings, conclusions, and recommendations. He found, in part, that Christopher had nothing good to say about his father and, by contrast, Christopher could not say enough positive about his mother. (Resp. Ex. 2, pp. 8-9). In perhaps further contrast, Dr. Rossiter had nothing good to say about Deborah, enumerating 44 instances of what he perceived to be her shortcomings. (Resp. Ex. 2, pp. 11-13). With respect to Lorenzo, Dr. Rossiter found that, despite his earlier history, Lorenzo had "emerged" in 1995 and the years since then, and that he has attempted to repair his personal shortcomings through devotion to the boys and by giving them as much love and attention as he could. (Resp. Ex. 2, pp. 6-7). He concluded, in part, that Deborah *and her parents* should immediately seek individual and family psychiatric evaluations for delusional disorder, Munchausen's-by-proxy syndrome and parental alienation syndrome. (Resp. Ex. 2, p. 32). He recommended that temporary custody of the boys should be awarded to Lorenzo, and that visitation with Christopher by Deborah and her parents should initially be brief, closely supervised, and subject to Christopher's attending psychiatrist's recommendations. (Resp. Ex. 2, pp. 31-32).

On June 14, 2005, the report was submitted to the circuit court and the attorneys for the parties

through Ms. Bischoff. On that day, the circuit court issued a protective order that the lawyers were not to release a copy of or any information concerning Dr. Rossiter's report to their clients. (Vol. 2 of 3, R. C000463). As part of that same order, the circuit court compelled the parties and the children to appear in court on June 15, 2005, without any explanation for the mandate. (Vol. 2 of 3, R. C000463).

On June 15, 2005, Lorenzo filed his Petition for an Order of Protection (Vol. 2 of 3, R. C000464) and his Emergency Petition for Change of Custody. (Vol. 2 of 3, R. C000478) Both Petitions were ostensibly based on Dr. Rossiter's report. In fact, the Emergency Petition for Change of Custody refers to the findings, conclusions and recommendations set forth in Dr. Rossiter's report. (Vol. 2 of 3, R. C000478). On June 15, 2005, the parties were then provided copies of the report that they were to read while in court. Deborah's attorney objected on the basis of not receiving 10 days notice pursuant to Section 5/605, and that Deborah was being denied her statutory right to cross-examine the witness. (Tr. R000648).

The circuit court did not examine the Petitioner (Lorenzo) under oath or affirmation nor make the minimum required findings, as required by Section 5/605. The court simply referred to Dr. Rossiter's report which has "very serious and disturbing conclusions and recommendations which I accept." (Tr. R000654). The circuit court then granted the Petition and ordered the preparation of the EOP itself. (Vol. 2 of 3, R. C000467). When reminded that he had not addressed the Emergency Petition for a Change in Custody, the circuit court simply granted the Emergency Petition without further ado. (Tr. R000659; Vol. 2 of 3, R. C000481) Suddenly, Deborah,

who was the primary caregiver of her children since their births, was now a non-custodial parent without any visitation rights. Both orders were continued to June 29, 2005. (Vol. 2 of 3, R. C000481-482).

Thirty extensions of the Emergency Order of Protection were entered between June 29, 2005 and December 12, 2006. On September 29, 2005, the circuit court addressed Deborah's Motion for a Rehearing and Reconsideration, filed on July 5, 2005, (Vol. 3 of 3, R. C000513). Deborah's attorney questioned how the extensions were being granted without motions being filed, and whether the extensions were really granted "in open court." (Tr. R000752). He argued that on one particular day, August 23, 2005, the order extending the EOP recited that all the parties were present in open court when neither he nor his client were there—he was attending a funeral in Chicago. (Tr. R000690). Lorenzo's attorney argued that he did not need a motion to extend (Tr. R000746), and that it did not matter if the EOP was not extended in open court (Tr. R000746). The children's representative, Ms. Bischoff, argued that it was permissible for the circuit court to extend an Order of Protection on its own initiative. (Tr. R000722-733) The circuit court denied Deborah's motion to vacate the EOP. (Vol. 3 of 3, R. C000551)

Ultimately, on December 12, 2006, the circuit court dismissed Lorenzo's Petition for an Order of Protection and vacated the EOP. (Vol. 2 of 5, R. C000393). However, on that day the circuit court simultaneously entered a "no contact" order barring Deborah from having any contact with her boys. (Vol. 2 of 5, R. C000295)

At the custody proceedings before Judge Truitt held on June 6, 2007, Lorenzo presented the testimony of Brian D. Klaung, LCSW ("Klaung"). (Tr. R002592). Over Deborah's objection, Klaung, a licensed clinical social worker, was allowed to testify and render opinions as an expert. (Tr. R002408, R002427) Klaung had been hired by Lorenzo on June 23, 2005 to provide counseling to Christopher and Jonathan, shortly after the circuit court's June 15, 2005 emergency orders. (Tr. R002430). On June 23, 2005, Klaung spoke with Lorenzo and his then wife who provided Klaung with a copy of Dr. Rossiter's report, as well copies of the divorce decree, and the EOP, and their chronology of medical treatment and various incidents that occurred from 1993 to the present. (Tr. R002435). On June 26, 2007, Klaung met with the boys. Based on those two meetings, and without yet having read Dr. Rossiter's report, Klaung came to the conclusion that Deborah should have no contact with her children. (Tr. R002480-2481). During the entire two years of his involvement with this case, Klaung has never contacted or attempted to interview Deborah, because "she was not my client." (Tr. R002534).

Klaung testified that he was "convinced with a complete degree of certainty" that the "parental alienation syndrome" as well as "Munchausen syndrome by proxy" had occurred with Deborah, and that a delusional disorder had resulted in Deborah. (Tr. R002436, R002438-39) Klaung further testified that he was "convinced within a reasonable degree of medical certainty" that Deborah and her parents were "delusional." (Tr. R002451).

Klaung recommended that the boys have no contact with their mother until she had undergone

intensive psychotherapy, referencing Dr. Rossiter's report. (Tr. R002508). When shown that Dr. Rossiter's report recommended supervised visits, Klaung admitted that he misinterpreted the report. (Tr. R002509). However, he still did not agree with Dr. Rossiter's recommendation for supervised visitation. (Tr. R002541). Klaung stood by his opinion that there should not even be supervised visitation, because in his opinion there was no person who possessed the skills to supervise, due to the severity of the abuse that has occurred. (Tr. R002443-2444).

Klaung never spoke with Dr. Rossiter (Tr. R002487), nor Christopher's treating physician, Dr. Husain (Tr. R002505), or Christopher's treating psychiatrist, Dr. Goslawski (Tr. R002506). Klaung had only taken six hours of courses on ethics (Tr. R002411) and one course on the parental alienation syndrome (PAS). (Jr. R002412). He had not taken any courses on Munchausen's. (Tr. R002487). He was unaware of a parenting skills test called ASPECT, and thought it was a pain tolerance test. (Tr. R002536). When asked whether the MMPI-II was one of the top tests in the field of psychology, he answered, "I'm not qualified. I am not a clinical psychologist." (Tr. R002484).

In the circuit court's MOD, Judge Truitt essentially adopted all of the opinions of Klaung, and ordered sole custody to Lorenzo with no contact (not even supervised visitation), for Deborah. (Vol. 5 of 5, R. C001009).

Judge Truitt applied the standard of "change in circumstances and the best interest of a child," rather than the standard of "serious endangerment to the child's physical mental, moral or emotional health." (Vol. 5 of 5, R. CO01010).

At trial, Dr. Rossiter testified substantially in conformity with his report of June 10, 2005. He concluded Deborah and her parents were afflicted with a delusional disorder, parent alienation syndrome, and Munchausen's-by-proxy syndrome. While arriving at the conclusions regarding Munchausen's, Dr. Rossiter admitted that he had only dealt with one or two such cases.

Dr. Allen M. Jaffee, Psy.D., Professor of Psychiatry at Northwestern University for the last 25 years, also testified. He had administered the MMPI-II test to Deborah in October of 2006. (Tr. R003120) According to Jaffee, the MMPI-II was a most reliable test for psychological assessment. (Tr. R003114)

While Rossiter's appointment as a Section 5/605 investigator authorized him to have psychological tests performed on the parties or children to explain why the testing was performed or not performed, Dr. Rossiter did not do so, explaining at trial that he did not think it was necessary. He thought that the MMPI-II test was a test of 350 or maybe 250 questions (Tr. R003115) and that a person could be coached to achieve better results. (Jr. R003116)

Dr. Jaffee testified to the contrary, that the MMPI-II was a test of 567 questions and never had as few as only 350 (Tr. R003115), and that coaching could not affect the results. (Jr. R003115) One of the scales looks specifically for an indication of Munchausen's indicated by an elevated score. Deborah's score was not elevated. (Tr. R003136)

When asked about the ASPECT test, Dr. Rossiter had only a general idea of what it was. (Tr. R002855) Dr. Jaffee explained that ASPECT was the Ackerman Schoendorf Parenting Effectiveness for Custody Test

that he administered to Deborah. (r. R003153). In the field of psychiatry, ASPECT is considered very reliable. (Tr. R003156-003157). The results for Deborah were at a high level in terms of her ability to parent. (Jr. R003157).

Dr. Rossiter spent no time with Deborah's father and only "some period of time" with Deborah's mother but concluded that all three had delusional beliefs. (r. R0028292830) Dr. Jaffe thought that Dr. Rossiter's arriving at that conclusion after a 30 minute conversation was outrageous. (Jr. R003143)

Dr Husain was a treating internist of Christopher for a year and a half prior to the time that Dr. Rossiter completed his report, but Dr. Rossiter never spoke to him. (Tr. R002814-2815)

Dr. Goslawski was Christopher's psychiatrist for a year and a half prior to the time that Dr. Rossiter completed his report (Tr. R002817), but Dr. Rossiter never spoke to him, either. (Tr. R002820)

ARGUMENT

I. LORENZO'S COUNTER-PETITION FOR CHANGE OF CUSTODY IS A NULLITY.

Lorenzo's Counter-Petition for Change of Custody is a nullity, as it was filed without leave of court within 2 years of the custody judgment, in violation of 750 ILCS 5/610(a). The determination of the validity and legal sufficiency of a pleading is reviewed de novo. *Fischer v. Senior Living Properties, LLC*, 329 Ill.App.3d 551, 560 (4th Dist. 2002)

On September 18, 2001, judgment on permanent custody and the remaining financial issues was entered by the circuit court (Vol. 6 of 6, R. C000978). Specifically, the judgment stated: "6. The parties

hereto have previously entered into a joint parenting agreement, which agreement is made a part of this Judgment on Remaining Issues." (Vol. 6 of 6, R. C000978). That judgment was timely appealed (Vol. 6 of 6, R. C000981).

While the judgment was on appeal, on November 19, 2001 without leave of court Lorenzo filed a Counter-Petition for Change of Custody (Vol. 6 of 6, R. C000987). The Counter-Petition was filed within two years of the custody judgment (it was filed approximately two months after the custody judgment).

750 ILCS 5/610(a) states:

Unless by stipulation of the parties or except as provided in subsection (a-5), no motion to modify a custody judgment may be made earlier than 2 years after its date, **unless the court permits it to be made** on the basis of affidavits that there is reason to believe the child's present environment may endanger seriously his physical, mental, moral or emotional health. (emphasis supplied)

Lorenzo violated Section 5/610(a) by failing to obtain leave of court to file his Counter-Petition for Change of Custody. There is no court order permitting the filing of his Counter-Petition. Similar to filing an amended complaint without leave of court, filing a pleading requiring court permission is also a nullity. *See Fischer*, 329 Ill.App.3d at 560 (amended complaint filed without leave of court is a nullity).

In 2007, the circuit court conducted a trial based on Lorenzo's Counter-Petition. Specifically, the circuit court's MOD recites: "This came on for hearing which commenced June 4, 2007 on the Counter-Petition for Change of Custody filed by the Respondent Lorenzo Orlando. This Counter-Petition was filed November

19, 2001." (Vol. 5 of 5, R. C001009) Following the trial, the circuit court entered judgment modifying permanent custody based on Lorenzo's void Counter-Petition. (Vol. 5 of 5, R. C001015)

Because Lorenzo failed to obtain leave of court to file his Counter-Petition, it is a nullity and because there was no operative pleading on file upon which the circuit court could hold a trial. Accordingly, this Court should reverse and vacate the circuit court's MOD, and remand this cause for further proceedings.

II. THE CIRCUIT COURT ERRED IN ENTERING AN EMERGENCY ORDER OF PROTECTION AGAINST DEBORAH, AND IN REPEATEDLY EXTENDING THE EMERGENCY ORDER.

The circuit court erred in entering an Order of Protection against Deborah on June 15, 2005 without a showing of good cause, and in repeatedly extending the EOP between June 2005 and December 2006 without a motion, without a hearing, not "in open court," and after it had expired.

A. The Right to Raise Children is Constitutionally Protected.

Courts in the United States frequently emphasized the importance of the family. "The liberty interest. . . of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville,* 530 U.S. 57, 65 (2000). The right to conceive and to raise children has been deemed "essential," *Stanley v. Illinois*, 405 U.S. 645, 651 (1972), citing *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923) and has been deemed a "basic civil right of

man." *Stanley*, 405 U.S. at 651, citing *Skinner v. Oklahoma*, *316 U.S. 535, 541 (1942).*

The rights to conceive and raise children have been considered "(r)ights far more precious than property rights." *Stanley,* 405 U.S. at 651, citing *May v. Anderson*, 345 U.S. 528, 533 (1953). "The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment (*Meyer,* 262 U.S. at 399), the Equal Protection Clause of the Fourteenth Amendment, (*Skinner* 316 U.S. at 541), and the Ninth Amendment (*Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring))." *Stanley*, 405 U.S. at 651.

The issue of whether a person's procedural due process rights were violated is reviewed *de novo*, as the allegations involve only questions of law. *In re George*, 314 Ill.App.3d 1044, 1046 (3rd Dist. 2000).

B. The Circuit Court Erred in the Issuance of the Emergency Order of Protection on June 15, 2005, Without a Showing of Good Cause.

1. Statutory Requirements for the Issuance of an Emergency Order of Protection.

In order to issue an emergency order of protection, 750 ILCS 60/214(a) requires that the circuit court must first find that abuse has been committed against the petitioner or the child on whose behalf the petition is brought. The circuit court must make written findings of fact, pursuant to Section 60/214(c)(3). In the case of an emergency order, in lieu of written findings the circuit court may, **upon affirmation or questioning of the petitioner**, decide that the averments are sufficient to warrant the issuance of such an order. 750 ILCS 60/214(c) (4).

A trial court's exercise of discretion in issuing an order of protection or denying a request for an order of protection will not be overturned absent a clear abuse of discretion. *In re Marriage of Fischer*, 228 Ill.App.3d 482, 489 (4th Dist. 1992).

2. The Circuit Court Erroneously Issued the Emergency Order of Protection on June 15, 2005, in Violation of Illinois Statutory Requirements.

On June 15, 2005, the circuit court issued the EOP. (Vol. 2 of 3, R. C000467) The EOP was issued based on Lorenzo's Petition for an Order of Protection (Vol. 2 of 3, R. C000464).

The circuit court violated Illinois statutory requirements when it issued the EOP, as the circuit court failed to make the requisite findings under 750 ILCS 60/214(c). Section 60/214(c) requires that "the court shall make its findings in an official record or in writing." However, the circuit court made no such findings in this case, in violation of Illinois statutory requirements.

The foregoing demonstrates that the circuit court erroneously issued an EOP against Deborah on June 15, 2005, in violation of Illinois statutory requirements.

C. The Circuit Court Erred in Repeatedly Extending the Emergency Order of Protection Against Deborah Without a Motion or Hearing, After It Had Expired, and Not "in Open Court."

1. Statutory Requirements for Extending an Emergency Order of Protection.

An emergency order of protection may be issued for as long as 21 days, under 750 ILCS 60/220(a)(1), at

which point it may be extended on the basis of the petitioner's motion if uncontested and "in open court." 750 ILCS 60/220(e). The statute requires that the extension must be made in open court so that the respondent has an opportunity to be heard and contest the extension of an emergency order. 750 ILCS 60/220(e).

2. The Circuit Court Erroneously Extended the Emergency Order of Protection in Violation of Illinois Statutory Requirements.

The EOP was extended 30 times. (Vol. 3 of 3, R. C000532, C000533, C000534, C000548, C000550, C000583; Vol. 1 of 5, R. C000039, C000050, C000052, C000055, C000065, C000066, C000071, C000085, C000103, C000111, C000121, C000131, C000232, C000233; Vol. 2 of 5, R. C000274, C000288, C000295, C000317, C000323, C000332, C000337, C000340, C000342, C000369.) On December 12, 2006, the EOP was vacated, and Lorenzo's Petition for an Order of Protection was dismissed (Vol. 2 of 5, R. C000393).

These continuous extensions were made without any motions by Lorenzo, in violation of the statutory requirements of Section 60/220(e). On one occasion, the EOP was extended after it had expired. On October 13, 2005, the EOP was extended to December 7, 2005, well-beyond its statutory limit of 21 days (Vol. 3 of 3, R. C000583). It expired on November 3, 2005. However, 55 days later, on December 7, 2005 the circuit court extended the EOP (Vol. 1 of 5, R. C000039). In this instance, the circuit court erroneously extended the EOP after it had terminated.

Moreover, the EOP was extended without a hearing and not "in open court." The extensions on August

23, 2005 and September 2, 2005 were particularly egregious, as the court docket indicates that a hearing took place on August 23, 2005, and that Deborah was served "in open court" on September 2, 2005; however, neither event took place (Vol. 3 of 3, R. C000541-542). In Deborah's verified Motion to Vacate Order of Protection, filed September 14, 2005, Deborah's counsel stated: "Neither Deborah Orlando Cooney nor her counsel were served in open court with a copy of the order. . . [t]here was no hearing held on August 23, 2005, and . . . the attorney for the petitioner was not in court due to . . . having to attend a funeral. . . ." (Vol. 3 of 3, R. C000541-542). This was one of multiple petitions filed by Deborah seeking to vacate the EOP (Vol. 3 of 3, R. C000515, C000541, C000555; Vol. 1 of 5, R. C000011).

D. The Circuit Court Committed Procedural Due Process Violations in Issuing and Extending the Emergency Order of Protection.

"Procedural due process claims question the constitutionality of the procedures used to deny a person's life, liberty, or property." *Lyon v. Department of Children and Family Services*, 209 Ill.2d 264, 272 (2004). "The due process clause requires that the opportunity to be heard occur 'at a meaningful time and in a meaningful matter.'" *Lyon* 209 Ill.2d at 277, *citing Matthews v. Eldridge*, 424 U.S. 319, 333 (1976).

Deborah was denied her fundamental right to raise her children when her children were taken from her pursuant to the EOP, as (a) she was never given a hearing despite the countless extensions of the EOP, (b) the EOP was extended 30 times without any motion from Lorenzo, (c) the EOP was extended one time after it had already expired, and (d) the EOP

was extended *sua sponte* and not "in open court" This was a clear violation of Deborah's constitutional rights to procedural due process.

E. The Erroneous Entry of the Emergency Order of Protection, and the Erroneous Extensions of the Order, Tainted the Outcome of the Trial.

It is axiomatic that lack of contact between the non-custodial parent and child can lead to alienation of the non-custodial parent, just as reasonable visitation schedule is necessary to foster the child's relationship with the non-custodial parent. *See e.g. Ford v. Marteness,* 368 Ill.App.3d 172, 178 (4th Dist. 2006). In the case at bar, not only did this occur, but it tainted the testimony of the minor children, and ultimately the trial.

When initially interviewed by the court on July 9, 2004, Christopher Orlando gave a very negative picture of his relationship with his father, including allegations of abuse and coercion. Christopher testified that Lorenzo tried to kill him (Tr. R000551); that he did not want to have a relationship with Lorenzo, as he would "end up dead" (Tr. R000555); and that he would not spend any more time with Lorenzo, even if the court ordered him to do so (Tr. R000556). Christopher further testified that Lorenzo told him what to say to Katherine Bischoff, and if he did not make those statements "there will be consequences." (Tr. R000560) Specifically, Lorenzo threatened that he would "go after [Christopher's] family and friends" if Christopher did not tell Ms. Bischoff the things Lorenzo wanted him to say. (Tr. R000561)

However, when interviewed again on June 5, 2007, after being denied contact from Deborah for two

years, Christopher's opinions had radically changed such that he now wanted to remain with Lorenzo (Tr. R002338-2339, R002355)

Over that three year period, the last two in which Christopher had no contact with Deborah, he went from not wanting to stay with Lorenzo (who wanted to kill him) to miraculously wanting to stay with Lorenzo. This unreliable information, brought out after years of Christopher's alienation from his mother, was relied upon heavily in the MOD, and obviously tainted the decision.

While in Deborah's custody, prior to be being assigned to Lorenzo in 2005, the boys had been in the middle of and had witnessed countless arguments between their patents. During the time they lived with Lorenzo after entry of the EOP barring Deborah from contact, things naturally seemed very peaceful. It is understandable that by the time they testified at trial, the boys had grown comfortable with their "normal" environment with Lorenzo.

Accordingly, this Court should reverse and vacate the circuit court's orders granting and extending the EOP, reverse and vacate the MOD, and remand this cause for further proceedings.

III. THE CIRCUIT COURT ERRED IN TRANSFERRING CUSTODY OF THE PARTIES' MINOR CHILDREN TO LORENZO.

The circuit court erred in entering an emergency order modifying custody and transferring custody of the children to Lorenzo on June 15, 2005, without the requisite findings to support such an order, without providing Deborah the investigator's report 10 days prior to the "hearing," and without providing Deborah a hearing on custody.

A. Statutory Requirements for Granting a Change of Custody

750 ILCS 603(a) provides, in pertinent part: The court may award temporary custody under the standards of Section 602 and the standards and procedures of Section 602.1, after a hearing, or, if there is no objection, solely on the basis of the affidavits.

Under 750 ILCS 5/605(a), the circuit court may appoint an investigator to assist in its determination of custody. Pursuant to Section 5/605(c), the investigator must file a report and make it available to all parties at least 10 days prior to any hearing on custody, along with any underlying data and reports used in its compilation. Section 5/605(c) also requires that the responding party be given the opportunity at the hearing to cross-examine the investigator on his methods and findings. Section 5/605(c) explicitly states that "[al party may not waive his right of cross-examination prior to the hearing."

Under 750 ILCS 5/610(a), the circuit court may modify a previous custody arrangement provided there is reason to believe the child's present environment may endanger seriously his physical, mental, moral, or emctional health.

B. The Circuit Court Erroneously Granted the Emergency Petition for Change in Custody, in Violation of Illinois Statutory Requirements.

On September 18, 2001, judgment on permanent custody and the remaining financial issues was entered by the circuit court (Vol. 6 of 6, R. C000978). The custody judgment granted permanent sole custody of the parties' minor children to Deborah.

1. The Circuit Court Erred in Entering a No Contact Order Denying Deborah Any Contact or Visitation with Her Two Minor Children, Without Affording Deborah a Hearing.

Section 5/607(a) provides, in pertinent part:

A parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral or emotional health. 750 ILCS 5/607(a).

The circuit court violated Illinois statutory requirements when it issued the emergency order granting a change in custody on June 15, 2005, with no visitation, as the emergency order was issued without affording Deborah a hearing.

2. The Circuit Court Erred in Entering an Order GrantingLorenzo's Emergency Petition to Modify Custody Without the Requisite Findings to Support Such an Order.

750 ILCS 5/610(b) provides in pertinent part:

The court shall not modify a prior custody judgment unless it finds by clear and convincing evidence, upon the basis of facts that have arisen since the prior judgment or that were unknown to the court at the time of entry of the prior judgment, that a change has occurred in the circumstances of the child or his custodian . . . and that the modification is necessary to serve the best interest of the child.

The circuit court violated Illinois statutory requirements when it issued the emergency order granting a change in custody on June 15, 2005, as the circuit

court failed to make the requisite findings to support the entry of such an extraordinary order.

3. The Circuit Court Erred in Failing to Provide to Deborah the Investigator's Report at Least 10 Days Prior to the Custody "Hearing" on June 15, 2005.

On September 23, 2004, the circuit court entered an order appointing Lyle Rossiter, M.D. as an investigator to assist in its determination of custody (Vol. 2 of 3, R. C000375). Dr. Rossiter was appointed pursuant to 750 ILCS 5/605(a). Section 5/605(c) requires that the investigator make available to counsel any underlying reports, data or diagnostic reports, and that the investigator's report be mailed to counsel at least 10 days prior to the hearing on custody.

However, in violation of the statutory requirements, Dr. Rossiter did not make his report, nor the underlying materials available to Deborah 10 days before the purported "hearing" on custody. Rather, Deborah's attorney first saw Dr. Rossiter's report on June 14, 2005 (the day before the custody "hearing"), and the circuit court entered a "gag order" restraining Deborah's attorney from discussing Dr. Rossiter's report with Deborah. (Vol. 2 of 3, R. C000463) Additionally, on June 14, 2005, the circuit court entered an order compelling Deborah to appear in court with her children the next day, without any explanation of the reason for the mandate. (Vol. 2 of 3, R. C000463)

Deborah was not allowed to prepare for nor participate in a fair "hearing" to determine her rights to custody of her children. Instead, Deborah appeared in court with her children the next day as ordered,

without knowing why, and she was sandbagged with a Section 5/605(a) investigator's report and denied her statutory right to examine the investigator's underlying materials and cross-examine the investigator, in violation of Section 5/506(c). As noted above, Section 5/605(c) explicitly states that Deborah's right to cross-examine the investigator cannot be waived.

Thus, the circuit court violated Illinois statutory requirements when it issued the emergency order granting a change in custody on June 15, 2005, as the circuit court failed to provide Deborah with the requisite 10-day notice, and denied Deborah her statutory right to cross-examine the investigator.

C. The Circuit Court Committed Procedural Due Process Violations in Granting an Emergency Change in Custody of the Parties' Children.

As set forth above: "Procedural due process claims question the constitutionality of the procedures used to deny a person's life, liberty, or property." *Lyon*, 209 Ill.2d at 272.

"The due process clause requires that the opportunity to be heard occur 'at a meaningful time and in a meaningful matter.'" *Lyon* 209 Ill.2d at 277, *citing Matthews*, 424 U.S. at 333.

Deborah was denied her fundamental right to raise her children when her children were taken from her pursuant to the emergency order changing custody of her children to Lorenzo and pursuant to the order that she have absolutely no contact with her children, as she was never provided with the investigator's report and underlying data, she was denied her statutory right to cross-examine the investigator, she

never received a hearing, and the circuit court failed to make the requisite findings to support the order.

D. The Erroneous Entry of the Emergency Order Changing Custody and Barring Deborah From Any Contact With Her Children Tainted the Outcome of the Trial.

The erroneous entry of the order granting the emergency order changing custody and barring Deborah from any contact with her children tainted the outcome of the trial for the same reasons that the entry of the EOP and extensions thereof tainted the trial as set forth in Section II (E) above. Deborah will not restate them again here.

Accordingly, this Court should reverse and vacate the circuit court's emergency order changing custody and barring Deborah from having any contact with her children, reverse and vacate the circuit court's MOD, and remand this cause for further proceedings.

IV. THE CIRCUIT COURT APPLIED THE WRONG STANDARD AT TRIAL CONCERNING CUSTODY.

The circuit court applied the wrong standard at trial concerning custody, as the court erroneously applied the "best interests of the children" standard rather than the proper "serious endangerment to the children" standard required by 750 ILLS 5/610. The question of whether the circuit court applied the correct legal standard is a pure question of law that is reviewed *de novo*. *Williams v. Staples*, 208 Ill.2d 480, 487 (2004).

A. The Standard for a Change in Custody Within Two Years of the Last Custody Judgment is Clear and Convincing Evidence of Serious Endangerment to the Child.

750 ILCS 5/610(a), regarding modification of custody, provides, in pertinent part:

> Unless by stipulation of the parties...no motion to modify a custody judgment may be made earlier than 2 years after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe the child's present environment may endanger seriously his physical, mental, moral or emotional health.

As set forth above, on September 18, 2001 judgment on permanent custody and the remaining financial issues was entered by the circuit court (Vol. 6 of 6, R. C000978). Two months later, on November 19, 2001, Lorenzo filed a Counter-Petition for Change of Custody (Vol. 6 of 6, R. C000987). The Counter-Petition was filed within two years of the custody judgment. In the absence of allegations by affidavit that the children's health was seriously endangered, the Counter-Petition was improper under Section 5/610(a).

B. The Circuit Court Erred by Applying the Wrong Standard.

In Lorenzo's Counter-Petition, he makes only one conclusory allegation regarding the health of the children, which simply traces the statute: "The physical, mental, and emotional well being of the parties minor children will be seriously jeopardized if the children remain in the custody of the respondent." (Vol. 6 of 6, R. C000988) However, Lorenzo

does not allege any behavior of Deborah that would be tantamount to "dangerous." Although Lorenzo alleged that circumstances have changed, changed circumstances are not enough to justify a change in custody within two years of a custody judgment under Section 5/610(a).

In the MOD, the circuit court applied the incorrect standard: that the petitioner "bears the burden of proving by clear and convincing evidence that a change has occurred in the circumstances of the child. . ." (Vol. 5 of 5, C001008). This is the more lenient standard to apply under Section 5/610(b) only if the petition had been filed more than two years after the judgment awarding custody to Deborah.

The circuit court erroneously believed that permanent custody was awarded to Deborah in the Judgment for Dissolution of Marriage entered in June 15, 1998 (Vol. 5 of 6, C000876). Specifically, in the MOD, the circuit court stated: "when the judgment for dissolution of marriage was entered, sole custody of the parties' two minor children was awarded to [p]etitioner, Deborah Orlando Cooney." (Vol. 5 of 5, R. C001009). However, the Judgment for Dissolution of Marriage simply dissolved the marriage, and makes no mention or provision regarding custody. (Vol. 5 of 6, R. C000876).

Because Lorenzo's Counter-Petition to change custody was filed within two years of the judgment awarding permanent custody of the children to Deborah, the correct standard is set forth in Section 5/610(a), to wit: "that there is reason to believe the child's present environment may endanger seriously his physical, mental, moral or emotional health." 750 ILCS 5/610(a).

In the MOD, the circuit court never found that the evidence clearly and convincingly showed that the "children's present environment may endanger seriously their physical, mental, moral or emotional health," as required by Section 5/610(a). Thus, the circuit court's findings were against the manifest weight of the evidence as to the "serious endangerment" standard that the circuit court was required to apply. Accordingly, This Court should reverse and vacate the circuit court's MOD, and remand this cause for further proceedings.

V. THE CIRCUIT COURT ABUSED ITS DISCRETION IN GRANTING LORENZO'S COUNTER-PETITION FOR CHANGE OF CUSTODY.

Even assuming that the circuit court did not utilize the incorrect standard to modify custody under Section 610, transfer of permanent custody to Lorenzo was not justified because he failed to present clear and convincing evidence that this was in the children's best interests due to a change of circumstances.

A judgment of the circuit court in custody matters will not be set aside unless it is shown that there was an abuse of discretion. *In re Marriage of Batchelor*, 89 Ill.App.3d 781, 783 (3rd Dist. 1980). An abuse of discretion is shown when the judgment of the trial court is found to be palpably erroneous, contrary to the manifest weight of the evidence or manifestly unjust. *Id.*

However, a modification of custody is a "drastic action." *In re Marriage of Gordon*, 233 Ill.App.3d 617, 664 (1St Dist. 1992). In addressing a trial court's modification of custody, there is a presumption in

favor of the custodial parent. *Naylor v. Kindred*, 250 Ill.App.3d 997, 1004-05 (4th Dist. 1993).

The MOD stated that Lorenzo had the burden of proving by clear and convincing evidence that a change had occurred in the circumstances of the child or his custodian and that the modification is necessary to serve the best interests of the children. (Vol. 5 of 5, R. CO01010). This would be the correct standard, under Section 5/610(b), assuming arguendo that Lorenzo's Counter-Petition had been filed beyond two-years after the judgment awarding Deborah permanent custody of the children.

Every presumption is indulged in the validity of the custody provisions in the divorce decree and, if custody provisions are to be changed in the post-decree proceedings, the burden of proof is on the moving party to show why the change should be made. *In re Marriage of Valliere*, 275 Ill.App.3d 1095, 1100 (5th Dist. 1995). The trial court's judicial Discretion is limited to pleadings and proof pertaining to a change in circumstances that affect, adversely, the best interests of the child sufficient to warrant the modification of the decree. The court's discretion, although great, is limited by the requirements contained in Section 5/610. *Valliere*, 275 Ill.App.3d at 1100.

The trial court's discretion in this case should have been limited to the allegations in Lorenzo's November 2001 Counter-Petition that was finally heard by the circuit court at trial commencing June 4, 2007. The circuit court's consideration in its MOD of not only the spurious allegations of Deborah's mental illness, but all the other vast ranging topics explored at trial and incorporated in the Decision was wholly improper. *See Valliere*, 275 Ill.App.3d at 1100.

The scope of evidence considered at the trial was, at best, akin to an initial custody determination. It was in reality more synonymous to a modification hearing whereby Deborah erroneously carried the burden to justify the reversion of her parental custody and visitation rights, notwithstanding that the burden squarely remained on Lorenzo to prove by clear and convincing evidence that transfer of permanent custody to him was justified.

A. There Was No Clear and Convincing Evidence of a Change in Circumstances.

The circuit court found that a change in circumstances had been established, in that: "Specifically, both parties have remarried and Petitioner Deborah Orlando Cooney has a child with her present husband." (Vol. 5 of 5, R. CO01010). Of course this was true in 2007, but not when the Counter-Petition was filed. Deborah had remarried and had a child with her husband, Edward, by 2001 when the Counter-Petition was filed. However, Lorenzo did not remarry until 2002. Further, at the time of trial the boys were nearly 18 years of age (Christopher) and 15 1/2 years of age Jonathan).

The MOD also noted: "Finally, subsequent to the original "judgment order granting sole custody to the Petitioner, custody was transferred to Respondent by Court Order dated June 15, 2005, which further provided that Petitioner was to have no contact or visitation with one of the parties minor children, Jonathan Orlando, until further Order of the Court." (Vol. 5 of 5, R. CO01010).

However, the circuit court failed to note that, in addition to the court order of June 15, 2005 prohibiting Deborah from contact or visitation with

Jonathan, there was simultaneously entered on that day the EOP which prohibited any contact with either boy, and the EOP was extended 30 times until finally being vacated on December 12, 2006. However, the day it was vacated, the circuit court also entered an order amending the emergency order changing custody (entered June 15, 2005), such that Deborah could have no contact with either boy or additional family members.

As argued earlier in this brief, the two orders entered on June 15, 2005—the EOP and emergency order changing custody and prohibiting Deborah from contact or visitation with Jonathan—were erroneously and unconstitutionally entered.

The legislative intent of Section 5/610 of the Marriage Act is to make custody arrangements as permanent as possible. *In re Marriage of Cesaretti,* 203 Ill.App.3d 347, 353-54 (2nd Dist. 1990). A trial judgment may not make an order "temporary" in order to circumvent the stringent standards of Section 5/610(b), especially where, as here, all the other issues in the case were resolved. A trial judge has no authority to continue a temporary custody order indefinitely at his or her discretion to avoid either making a difficult decision or to avoid the requirements of Section 5/610. *Id.* at 354; accord, *Valiere*, 275 Ill.App.3d at 1101; *Herron v. Herron*, 74 Ill.App.3d 748, 753-54 (1st Dist. 1979) (holding that the judge may not retain custody disposition, making one custody disposition after another, by designating them "temporary").

The circuit court apparently failed to give any weight to the impact of those two unconstitutionally granted orders on the entire family scene that the court was viewing at the trial in 2007. To the

contrary, the court utilized this circumstance of its own creation to Lorenzo's benefit in deeming it a "changed circumstance" under Section 5/610(b). Such changed circumstances as existing at the time of trial would be akin to the fruit, as it were, of an illegal "stop" in Deborah's contact with her children, and undercuts the legislative intent that custody modification should be difficult to achieve.

B. There Was No Clear and Convincing Evidence That Modification of Custody Was in the Best Interests of the Children.

In determining the best interests of a child, the court must consider the particular facts and circumstances of each case. *Lloyd v. Lloyd*, 92 Ill.App.3d 124, 126 (1980).

Admittedly, in the past, both boys had been in the middle of and had observed almost countless squabbles between their parents with resulting court proceedings concerning visitation and other matters. However, during the two year period from the entry of the emergency orders (on June 15, 2005) to the time of trial in June 2007, they did not observe any squabbles between their parents because they did not see or have any contact with their mother who had been their primary caregiver since their births. It is understandable that, at the time of trial, the boys felt that their current life with their father was somehow "normal."

Lorenzo has admitted to physical violence, harassment, and being inattentive towards Deborah and his children over an extended period. (Tr. R002654-2659) Lorenzo admittedly engaged in at least one extramarital affair leading up to the dissolution of his marriage to Deborah, which he attributed to "stereo-

typical roles" for husband and wife per his 2005 interview with Dr. Rossiter. (Resp. Ex. 2, p. 6) Lorenzo has, in other words, shown many tangible manifestations of instability himself.

The circuit court was not acting within its discretion to simply overlook these facts and focus instead solely on Deborah's alleged deficiencies. The court further ignored the likelihood that Lorenzo's abusive behavior and indiscretions may have contributed to any shortcomings Deborah might have. *See In re Marriage of Stuart*, 141 Ill.App.3d 314, 318 (5th Dist. 1990) (court excused the mother's "emotional, even hot—tempered" demeanor and awarded her permanent custody even though she drove car into back of the husband's truck, where the husband's misconduct had precipitated the incident); *In re Marriage of Gustayson*, 247 Ill.App.3d 797, 801-802 (4th Dist. 1993) (holding that although the mother's suicide attempt may have presented concerns about the child's welfare, the trial court properly considered the fact that the suicide attempt was prompted by the wrongful conduct of the non-custodian father).

Consistent with its casually brushing aside all concerns about Lorenzo's darker aspects, the circuit court also failed to consider how the abrupt change of custody to him may have permitted Lorenzo to influence the boys' testimony unjustly. *See In re Marriage of Batchelor*, 89 Ill.App.3d 781, 785 (3rd Dist. 1980) (sons' statements that they preferred to stay with their father, given shortly after their stay with father for three months over the summer had ended, were held insufficient to modify custody judgment to transfer custody from mother to father); *see also People v. Dizney*, 26 Ill.App.3d 45, 49 (2nd

Dist. 1975) (finding that trial court correctly determined that custodial defendants had contributed to the alienation of the children from parents, and that extending the separation would foster the alienation).

With respect to the best interest factor of interaction and interrelationship of the children with their parents, this was a one-way street—leading to Lorenzo. Pursuant to court order, the children had no contact with their mother for the two years preceding the trial. There was no opportunity to build on or develop or, perhaps, even change the relationships Deborah had with her children for the first 16 (Christopher) and 13 1/2 years (Jonathan) of their lives. In contrast to the present situation whereby Lorenzo's tactics have burned all bridges between Deborah and the children due to the "no contact" orders, the evidence showed that when Deborah had custody she would attempt to extend Lorenzo extra or make-up visitation, or switch scheduled visitation, to accommodate his schedule. (Tr. R002641-2653)

Regarding the children's adjustment to their home, school and community, the circuit court points out that for the most part they seem to be doing well in the second year after their custody was transferred to Lorenzo. The court relied on the fact that Jonathan is playing football and Christopher is running track. (Vol. 5 of 5, R. C001011). Yet, this appears to be no different from when they were living with their mother: Jonathan was also playing football and Christopher was playing soccer. (Tr. R000507-566). The court also turns a blind eye to the fact that Jonathon admittedly received numerous demerits in school, and evidence was presented that he may have been close to expulsion in 2006, while he was in Lorenzo's custody. (Tr. R002605-2608)

With respect to the mental and physical health of the individuals involved, the circuit court relied heavily on the testimony of clinical social worker Brian Klaung who, as explained below, was simply unqualified to clinically diagnose mental illness or opine as to recommended treatment. Deborah conversely presented the testimony of professor of psychology and licensed clinical psychologist Dr. Alan F. Jaffe. Dr. Jaffe opined that Deborah's results on comprehensive standardized tests indicated that she was not mentally ill (on the renowned Minnesota Multiphasic Personality Inventory test, or "MMPI-II"), and, in fact, Deborah's test results presented a psychological profile consistent with the traits necessary for successful parenting (on the Ackerman Schoendorf Parenting Effectiveness for Custody Test or "ASPECT"). (*See* Tr. R003114; R003153-3157)

Conversely, the circuit court put much stock in the testimony of Lorenzo, going so far, for instance, as to discredit Deborah's testimony entirely as to whether she advised him of the boys' medical treatment simply because Lorenzo may have contradicted her when he claimed "he could not remember" their doctors' names. (Vol. 5 of 5, R. C001013) The court altogether fails to give any indication that Lorenzo's self-serving statements might be less than the gospel truth, and expressly disregards Lorenzo's recent criminal charge of felony eavesdropping and guilty plea to attempted eavesdropping that is hardly representative of frank and truthful character. (Vol. 5 of 5, R. C001012) Indeed, Lorenzo denied taping Deborah's conversations despite the evidence to the contrary. (Tr. R002656) Such credibility determinations by the circuit court undercut Lorenzo's burden to provide clear and convincing evidence to warrant transfer of permanent custody.

Accordingly, this court should reverse the circuit court's MOD, and remand this case for further proceedings.

VI. THE CIRCUIT COURT ABUSED ITS DISCRETION IN ENTERING JUDGMENT DENYING DEBORAH ANY VISITATION WHATSOEVER OF THE PARTIES' MINOR CHILDREN.

The circuit court abused its discretion by denying visitation to Deborah based primarily on the improper and unsubstantiated "medical" diagnosis of Brian Klaung, in contradiction to the findings of appropriate medical professionals.

The appellate court reviews the trial court's resolution of visitation issues for an abuse of discretion, or to correct a manifest injustice that has been done to the child or the parent. In re *Marriage of Diehl*, 221 Ill.App.3d 410, 429 (2nd Dist. 1991); *In re Marriage of Anderson*, 130 Ill.App.3d 684, 688 (2nd Dist. 1985).

Two years passed between the circuit court's initial unjustified order of June 15, 2005 granting Lorenzo's Emergency Petition for Change of Custody (sending Christopher and Jonathon abruptly to the custody of Lorenzo), and the circuit court's MOD of June 20, 2007 formally denying Deborah visitation. In the two-year interim, Deborah was denied her parental right of visitation by virtue of the concurrently entered EOP, which was extended a seemingly unprecedented 30 times without affording Deborah a hearing.

Deborah's parental right to visitation at last came before the circuit court in the context of the trial commencing June 4, 2007, on Lorenzo's Counter-

Petition for Change of Custody (Vol. 5 of 5, R. C001009) The relevant standard for evaluating Deborah's non custodial parental right to visitation is governed by Section 5/607 of the Illinois Marriage and Dissolution of Marriage Act (the "Marriage Act"). 750 ILCS 5/607.

Section 5/607(a) of the Marriage Act states the general rule: "(a) [a] parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral or emotional health."

Likewise, Section 5/607(c) provides the rule for requests to modify a pre-existing visitation order: "(c) The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child; but the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral or emotional health."

The serious endangerment standard embodied in Sections 5/607(a) and 5/607(c) of the Marriage Act is "onerous, stringent and rigorous." *See e.g., In re Marriage of Diehl*, 221 Ill.App.3d 410, 429 (2nd Dist. 1991) (citations omitted). The legislative history states that this more onerous standard was deliberately chosen to indicate its stringency when compared to the "best interest" standard. *In re Marriage of Neat*, 101 Ill.App.3d 1046, 1048 (1st. Dist. 1981).

Only extreme circumstances permit courts to deprive a parent of visitation altogether inasmuch as "parents have a natural or inherent right of access to their children, and because . . . sound public policy

encourages the maintenance of strong family relationships, even in post-divorce situations." *Neat*, 101 Ill.App.3d at 1048. Liberal visitation is therefore the rule, while restricted visitation is the exception. *Id.* The custodial parent bears the burden to prove that the preponderance of the evidence shows visitation with the non-custodial parent would in fact seriously endanger the child. *Id.*

In the underlying case, the circuit court unequivocally abused its discretion in denying Deborah her parental right of visitation indefinitely, based primarily on the biased and improper opinion testimony rendered by Lorenzo's unqualified controlled expert witness, social worker Brian Klaung. This likewise represented a manifest injustice done to Deborah and the children inasmuch as the circuit court's precipitous determination to reverse its prior custody determination (by the previous court appointed evaluator, Dr. Thomas Dudgeon; at Tr. R000227) took the children from their primary caretaker who had raised and cared for them since birth.

The circuit court's MOD indefinitely denying visitation to Deborah, rested upon the circuit court's adoption of the opinion rendered by Klaung that Deborah's visitation with the boys would seriously endanger the children's health. (Vol. 5 of 5, R. C001013-1014)

A. As a Clinical Social Worker, Lorenzo's Controlled Expert Witness Brian Klaung was Not Qualified to Render a Diagnosis of Mental Illness Under Illinois Law, Much Less to Overrule the Findings of More Eminently Qualified Medical Professionals.

The standard of review for admission of expert testimony is abuse of discretion. *Snelson v. Kamm*, 204 Ill.2d 1, 33 (2003).

The fields of clinical social work and clinical psychology are functionally and legally distinct under Illinois law.

The practice of clinical social work is governed and regulated pursuant to the Clinical Social Work and Social Work Practice Act, 225 ILCS 20/1, *et seq.* (the "Social Work Act"), which defines the actual practice of clinical social work, as follows:

> 3. Definitions:
>
> * * *
>
> 5. "Clinical social work practice" means the providing of mental health services for the evaluation, treatment, and prevention of mental and emotional disorders in individuals, families and groups based on knowledge and theory of psychosocial development, behavior, psychopathology, unconscious motivation, interpersonal relationships, and environmental stress.

225 ILCS 20/3(5).

The permitted scope of professional services that a clinical social worker may offer, by definition, does not extend to the actual diagnosis of any mental or physical ailments.

Indeed, in *People v. Caffey*, the Illinois Supreme Court upheld the trial court's determination that a licensed clinical social worker could not render any testimony that appeared to be a diagnosis of mental illness, because he was not a psychiatrist. 205 Ill.2d 52, 125-26 (2001); *see also People v. Armstrong*, 186 Ill.2d 130, 150-52, (1998) (upholding similar limita-

tions that a licensed clinical social worker is precluded from offering testimony concerning a diagnosis, as any such testimony should be excluded as being beyond his expertise and unreliable evidence).

The independent assessment and classification of mental, emotional, behavioral or related disorders and conditions is instead the province of clinical psychologists. The practice of clinical psychology is governed and regulated under the Clinical Psychologist Licensing Act, 225 ILCS 15/1, *et seq.* (the "Clinical Psychologist Act"), which defines the actual practice of clinical psychology as follows:

> 2. Definitions.
>
> * * *
>
> 5) "Clinical psychology" means the independent evaluation, **classification and treatment of mental, emotional, behavioral or nervous disorders or conditions**, ...The practice of clinical psychology includes . . . the use of psychological and neuro-psychological testing, assessment,. . . 225 ILCS 15/2(5) (emphasis supplied).

The necessity of limiting the testimony and services rendered by clinical social workers in proceedings addressing the parent-child relationship is clearly shown via the express language of the Adoption Act, 750 ILCS 50/1, *et seq.* The Adoption Act defiles certain grounds upon which a parent may be found unfit—including claims of mental illness analogous to those upheld by the circuit court against Deborah—as follows:

> 1. Definitions.
>
> * * *

> p) Inability to discharge parental responsibilities supported by competent evidence from a psychiatrist, licensed clinical social worker, or clinical psychologist of **mental impairment, mental illness** or mental retardation as defined in Section 1-116 of the Mental Health and Developmental Disabilities Code, or developmental disability as defined in Section 1-106 of that Code, and there is sufficient justification to believe that the inability to discharge parental responsibilities shall extend beyond a reasonable time period. **However, this subdivision (p) shall not be construed so as to permit a licensed clinical social worker conduct any medical diagnosis to determine mental illness or mental impairment.**

750 ILCS 50/1(D)(p) (emphasis supplied)

Where a determination must be made on a matter directly impacting the continued relationship between parent and child, the fundamental interests at stake demand nothing less than that the court consider only the most reliable expert testimony. The Adoption Act reflects the reality that licensed clinical social workers are simply unqualified to diagnose mental illness or impairment. *See also, People v. Kastman*, 335 Ill.App.3d 87, 94-98 (2nd Dist. 2002) (the court explains the many distinctions between psychologists and social workers, and holds that the occupational title of clinical social worker falls within the larger occupational category of "sociologist").

Klaung himself admits that he is not qualified to provide even a simple answer concerning the nature of a basic clinical psychological test, the MMPI-II. When asked his opinion regarding the validity of the

test, he flat out states that: "I'm not qualified. I am not a clinical psychologist." (Tr. R002483-2484)

The Illinois Administrative Code governing application of the Social Work Act provides that the Department of Financial and Professional Regulation may "suspend or revoke a license . . . or take other disciplinary action" based upon unethical, unauthorized or unprofessional conduct, which is interpreted to include: "1) Practicing or offering to practice beyond one's competency (for example, providing services and techniques for which one is not qualified by education, training or experience)." 68 Ill. Adm. Code 5 1470.96(a) (1)

The Illinois Medical Practice Act, 225 ILCS 60/1, *et seq.* (the "Medical Practice Act"), likewise provides, in relevant part:

> 550. Any person practices medicine in all of its branches or treats human ailments without the assistance of drugs or operative surgery includeing, but not limited to, treatment or diagnosis of any physical or mental ailments or conditions including, but not limited to, deformities, diseases, disorders or injuries without a valid license under the laws of this State shall be sentenced as provided in Section 59.

225 ILCS 60/50

Klaung improperly "practiced medicine" in violation of the Medical Practice Act when he rendered opinions at trial—"to a near degree of medical certainty"—that Deborah and her parents were delusional. Klaung also improperly made diagnoses of "Parental Alienation Syndrome," "Munchausen Syndrome by Proxy," and an unspecified "delusional disorder" outside the area of his expertise, as follows:

Q. With regard to the direct interviews and the written histories from the children, what information did you glean from that?

A. Well, I believed that three conditions were operating simultaneously. I believe that—I was convinced that parental alienation syndrome had occurred. I believe that Munchausen syndrome by proxy or as the DSM-IV TR calls it fictitious disorder by proxy had occurred. And I believe that a delusional disorder had been established through the parent alienation syndrome.

(Tr. R002435-2436)

Q. Now, the three conditions that you saw presented, would you say that those exist with a reasonable degree of certainty?

A. I am convinced with a complete degree of certainty.

(Tr. R002438-2439)

Q. You indicated that prior to visitation being ordered or occurring that you would want evidence from a clinical professional that the delusions had been resolved?

A. Correct.

Q. Whose delusions?

A. The mother's and the grandparents.'

Q. Are you convinced within a reasonable degree of medical certainty that they are delusional? (emphasis supplied)

A. Yes.

(Tr. R002451)

B. Assuming, *arguendo*, that the Circuit Court did Not Abuse Its Discretion in Admitting the Improper Opinion Testimony of Brian

Klaung, Its Heavy Reliance on His Opinions Render Its Decision Erroneous.

Findings of fact following a bench trial are reviewed under the manifest weight of the evidence standard. *Bd. of Educ. of Community High Sch. Dist. No. 218 v. Vill. of Robbins*, 327 Ill.App.3d 599, 606 (1st Dist. 2001).

Assuming, for the sake of argument, that the circuit court acted within its discretion in permitting Klaung's improper medical opinion testimony in the first place, any such "diagnosis" is fatally undermined, *inter alia*, by the fact that Klaung had never met or directly spoken to Deborah prior to his testifying. Klaung readily admits this on direct examination. (Tr. R002447)

In and of itself, the fact that Klaung failed to meet with the subject of his purported diagnosis (i.e. Deborah) simply further undermines his professional expertise to render a clinical diagnosis of mental illness in her. Klaung's failure to meet with Deborah, however, does not merely reflect his general lack of professional expertise in the area of clinical psychology; it also underscores his complete lack of professional objectivity. His testimony on cross-examination reveals that his agenda was not to present balanced, objective expert testimony but merely to advocate for the position of his client, Lorenzo. When asked at trial why he did not bother to speak with Deborah or her parents directly to obtain a balanced perspective, Klaung responded simply that "[s]he was not my client." (Tr. R002534-2535)

As Lorenzo's own controlled expert witness, Klaung's bias in favor of Lorenzo was evident

throughout his testimony and it skewed his entire clinical methodology as shown above. Dr. Alan F. Jaffe, who is a licensed clinical psychologist and professor of psychiatry at Northwestern Medical School, referred to this sort of skewed methodology as a "confirmatory bias." (Tr. R003140)

The circuit court improperly admitted Klaung's opinion testimony over the repeated objections of Deborah's counsel (Tr. R002408-2554), finding: "[t]he [c]ourt is going to find him qualified as an expert in those areas he has testified to." (Tr. R002554) Klaung's improper and unsubstantiated testimony was insufficient to meet Lorenzo's onerous burden to prove that visitation would seriously endanger the welfare of the children. Not even the court-appointed investigator Dr. Rossiter recommended denying Deborah visitation rights. (Resp. Ex. 2, p.32)

To the extent the trial judge merely relied on his own observations, this also was insufficient to deny Deborah custody. The primacy of the parent-child relationship in the area of visitation rights must be recognized over that of the personal observations of the trial judge in the courtroom. *Neat*, 101 Ill.App.3d at 1048-1049.

Accordingly, this Court should reverse the MOD, and remand the case for further proceedings.

VII. THE CIRCUIT COURT ERRED IN DENYING DEBORAH'S MOTION FOR VOLUNTARY DISMISSAL.

The circuit court erred in denying Deborah's motion for voluntary dismissal on November 24, 1997, in violation of 735 ILCS 5/2-1009(a).

Section 2-1009(a) provides, in pertinent part:

> "The plaintiff may, at any time before trial or hearing begins, upon notice to each party who has appeared or each such party's attorney, and upon payment of costs, dismiss his or her action or any part thereof as to any defendant, without prejudice, by order filed in the cause."

On September 17, 1997, Deborah filed a Motion to Voluntarily Dismiss her petition for dissolution of marriage. (Vol. 4 of 6, R. C000640). At the time, no dispositive motions were pending, and no trial or hearing had begun. On September 18, 1997, the circuit court granted the motion for voluntary dismissal (Vol. 4 of 6, R. C000642) (See also Par. 1 in *Stipulation of the Parties*, in supplemental record on appeal).

On October 1, 1997 Lorenzo filed a Motion to Reconsider the circuit court's grant of Deborah's voluntary dismissal (Vol. 4 of 6, R. C000698). On November 24, 1997, the circuit court reconsidered its order, denied Deborah's motion for voluntary dismissal, and reinstated the underlying matter (See, Par. 2 in *Stipulation of the Parties*, and undated order attached thereto, in the parties' supplemental record on appeal). On June 15, 1998, the Judgment for Dissolution of Marriage was entered based on *Deborah's* Petition for Dissolution, not Lorenzo's Counter-Petition for Dissolution (Vol. 4 of 6, R. C000643).

"A plaintiff has an absolute right to take a voluntary dismissal unless...there exists a previously filed motion, which, if ruled upon, could result in a final disposition of the cause of action. . ." *In re Marriage of Manns*, 222 Ill.App.3d 338, 342 (5thDist.

1991). "It has been broadly held that the voluntary dismissal statute grants plaintiffs the absolute privilege to dismiss regardless of motive." *Manns*, 222 Ill.App.3d at 342, *citing Rohr by Rohr v. Knaus*, 153 M. App. 3d 1013, 1015 (5th Dist. 1987). The trial court has no discretion in the matter to interfere with the exercise of that right, nor can it condition any terms on the dismissal. *Manns*, 222 Ill.App.3d at 342, citing *City of Palos Heights*, 29 Ill.App.3d 746, 749 (1St Dist. 1975). Plaintiffs right, pursuant to Section 2-1009 of the Illinois Code of Civil Procedure, to voluntary dismissal without prejudice prior to trial is absolute and the court has no discretion to deny the motion for dismissal in such a case. *Morrison v. Wagner*, 305 Ill.App.3d 885, 887 (4th Dist. 1999), therefore appellate review is de novo.

The case most factually similar to the instant case is *In re Marriage of Mostow*, 95 Ill.App.3d 915 (15t Dist 1981). In *Mostow*, the predecessor to Section 2-1009(a), Rule 52 of the Civil Practice Act, with identical language, was at issue. The plaintiff moved for voluntary dismissal, and the defendant requested that the court impose conditions on the dismissal. One of the conditions the defendant wished included was a provision that the plaintiff be barred from seeking temporary maintenance. The defendant argued that by moving to dismiss the petition for dissolution of marriage, the plaintiff was waiving the temporary maintenance she had been granted after a hearing in the proceeding. The trial court refused to impose the conditions, holding that no trial had begun for the purposes of Section 52, because "the hearing was on the preliminary issues of temporary maintenance, support, and fees, and did not related to the issues of the dissolution action itself which petitioner sought to dismiss." 95 Ill.App.3d at 917.

The facts in the instant matter are virtually the same as in *Mostow*. On October 6, 1995, Lorenzo filed an Amended Petition to Terminate Maintenance (Vol. 2 of 6, R. C000341), amending his original Petition to Terminate Maintenance, filed June 21, 1995. (Vol. 2 of 6, R. C000265) In both the original Petition and Amended Petition, Lorenzo explicitly "prays this Court enter an Order terminating the Defendant's obligation to pay temporary maintenance to the Plaintiff." (emphasis added) (Vol. 2 of 6, R. C000341, R. C000265) Thus, like in *Mostow*, no trial or hearing had yet begun in the underlying matter, and Deborah was entitled to a voluntary dismissal as of right.

Accordingly, this Court should reverse and vacate the circuit court's order of November 24, 1997, reverse and vacate all of the circuit court's orders and judgments entered after September 18, 1997, and remand this cause for further proceedings.

VIII. THE CIRCUIT COURT ERRED IN DENYING DEBORAH'S MOTIONS TO TRANSFER VENUE TO COOK COUNTY.

The circuit court erred in denying Deborah's motions to transfer the matter to Cook County, as there was a previously filed action pending in Cook County, the children and virtually all of the witnesses resided in Cook County, and Deborah made a showing of prejudice in the underlying matter.

On November 17, 1993, Deborah filed a Petition for Dissolution of Marriage in the Circuit Court of Winnebago County. ("Winnebago County Petition"). (Vol. 1 of 6, R. C000001). In anticipation of the voluntary dismissal of the Winnebago County Petition, on September 15, 1997 Deborah filed a renewed Petition

for Dissolution of Marriage in the Circuit Court of Cook County (Court No. 97D 14208) ("Cook County Petition"). (Vol. 1 of 3, R. C000229) (See also Cook County Petition contained in Appellant's supplemental record).

On September 18, 1997, the circuit court granted Deborah's Motion to Dismiss the Winnebago County Petition. (Vol. 4 of 6, R C000642; *see also*, Para. 1 in the *Stipulation of the Parties, and Stipulation to Supplement the Record ("Stipulation of the Parties')* filed in this appeal). At that time, the Cook County Petition was the only operative pleading on file relative to the dissolution of marriage of Deborah and Lorenzo.

However, on September 22, 1997, without leave of Court, Lorenzo filed a Counter-Petition for Dissolution of Marriage in Winnebago County. (Vol. 4 of 6, R. C000643). On November 24, 1997, the circuit court reconsidered its order of dismissal and reinstated the underlying matter. (See, Par. 2 in *Stipulation of the Parties* and the undated order attached thereto).

In response, Deborah filed two motions to change venue seeking to transfer this matter to Cook County. (Vol. 5 of 6, R. C000797; Vol. 1 of 3, R. C000157, C000177). However, the circuit court denied Debora's motion, and her renewed motion, to transfer venue. (Vol. 1 of 3, R C0000241).

A. The Circuit Court Erred In Failing To Transfer This Matter to Cook County Where a Prior Filed Action Was Pending.

A circuit court's refusal to transfer a matter to another venue where a previously filed case was pending is reviewed for an abuse of discretion. *Zurich*

Ins. Co. v. Baxter Int'l Inc., 173 Ill.2d 235, 243-44 (1996)

A divorce proceeding is one cause of action. As this Court has held:

> A proceeding for dissolution of marriage is not made up of separate causes of action. While certain aspects of dissolution, i.e., property settlement, maintenance, etc., are handled only after the issue of grounds for dissolution is concluded, this in no way divides a dissolution proceeding into separate causes of action. . . A petition for dissolution of marriage begets one cause of action.

In re Marriage of Snider, 305 Ill.App.3d 697, 701 (2d Dist. 1999).

Also the Illinois Supreme Court has held: "A petition for dissolution of marriage advances but a single claim and that ancillary issues such as custody, property disposition and support are separate issues relating to that single claim." *In re Marriage of Leopando*, 96 III 2d 114, 119 (1983).

In this case, the circuit court erred in failing to transfer the matter to Cook County where a prior action was pending between the parties.

An illustrative case is *In re Marriage of Duff*, 223 Ill.App.3d 889 (3rd Dist. 1992). In *Duff*, the wife filed a petition for dissolution of marriage in the Fayette County circuit court. 233 Ill.App.3d at 890. Three days later, the wife filed an amended petition for dissolution of marriage in the circuit court of Tazewell County. *Id.* at 891. The Tazewell County court had a hearing on the wife's amended petition and entered an order directing the husband to pay child

support. *Id.* Subsequently, the Tazewell County court entered an order dissolving the parties' marriage and set a hearing on the remaining issues. *Id.* at 892. The husband moved to vacate the court's orders, and the Tazewell County court denied the husband's motion. *Id.*

On appeal, the husband argued that the Tazewell County court lacked subject matter jurisdiction over the matter. *Id.* The Appellate Court (reversing) stated:

> Under the circumstances, we believe that subject matter jurisdiction remained with Fayette County, and the Tazewell County court was not authorized to assume jurisdiction over any aspect of the cause except to transfer [the wife's] amended petition back to Fayette County. We find that the orderly administration of justice, this State's legitimate interest in discouraging forum shopping and the interest of the Fayette County court in continuing jurisdiction over the custody of the parties' children are all factors that weigh in favor of granting [the husband's] motion to vacate the Tazewell County orders

Id. at 895.

In this instance, *Duff* is applicable. The only jurisdiction that the Winnebago County circuit court retained, if any, over Lorenzo's Counter-Petition was to send this matter to Cook County, where Deborah's previously filed Petition for Dissolution of Marriage was pending. The circuit court erred in denying Deborah's motion to transfer and her renewed motion.

Accordingly, this Court should reverse and remand this matter, vacate all orders entered after September 18, 1997, and direct the lower court to transfer the matter to Cook County.

B. The Circuit Court Erred in Denying Deborah's Motion to Transfer this Matter to Cook County Under *Forum Non Conveniens*.

1. The Circuit Court Erred In Denying Deborah's Motion to Transfer Venue Based Upon the Parties' Changed Circumstances.

A circuit court's refusal to transfer a matter for forum non conveniens is reviewed for an abuse of discretion. *Dawdy v. Union Pac. R. R. Co.*, 207 Ill.2d 167, 176-77 (2003).

On November 25, 1997, Deborah filed a Motion to Transfer Venue to Cook County for *Forum Non Conveniens*. (Vol. 5 of 6, R C000797) However, before the circuit court ruled on the motion, Deborah subsequently filed a renewed Motion to Transfer Venue. (Vol. 1 of 3, R C000157, C000177). On December 11, 2003, The circuit court denied Deborah's requests for transfer. (Vol. 1 of 3 R C0000241). However, the circuit court erred in denying transfer, as there was a change of circumstances warranting transfer of the matter.

Under Illinois law, with respect to ruling on a change of venue pursuant to forum non conveniens, a circuit court abuses its discretion when it fails to transfer a matter upon a showing that the parties' circumstances have changed. W.R. Grace & Co. v. Beker Industries, Inc., 128 Ill.App.3d 215, 221 (1st Dist. 1984); *see also, Eads v. Consolidated Rail Corp.*, 365 Ill.App.3d 19, 29-33 (1st Dist. 2006) (the court abused its discretion when it denied a party's *forum non conveninens* motion because of changed circumstances).

In this case, the circuit court abused its discretion when it failed to transfer the matter as the parties' circumstances had changed, and Cook County was the more appropriate venue for this action. After filing the Winnebago County Petition, Deborah and her children moved to Chicago where she had temporary custody of her children. (Vol. 5 of 6, R. C000797). Second, Deborah's two children were enrolled and attending a school in Cook County and they participated in extra-curricular activities in Cook County. (Vol. 5 of 6, R. C000797). Third, the medical, educational, and counseling experts who were able to transfer to another venue was proper, the Appellate Court in *Pavelcik* enumerated the facts which demonstrated that Missouri was the more appropriate forum:

> Here, the children had been living in Missouri for over four years at the time the motion to transfer was filed. Indeed, they had been residing there for two and one half years at the time the petition for modification of visitation was filed. Obviously, any records of their schooling would be found in Missouri, as would any medical records for their care . . . as likely will be any friends. Information concerning these matters will not merely be helpful to an intelligent custody determination, but essential. The coalescence of these factors more than amply justifies the trial court's decision to defer to the courts of Missouri on this matter. . .(citations omitted). It is clear that the trial court was mindful of the considerations enumerated in the UCCJA in declining the exercise of jurisdiction over the matter, and that the facts amply support its

> conclusion that Missouri was the most appropriate forum to litigate any child custody matter.

138 Ill.App.3d at 1066.

In this instance, the circuit court abused its discretion by refusing to transfer the matter to Cook County, contrary to the best interests of Deborah's children. The facts, as set forth above, demonstrate that transferring this matter to Cook County would best serve judicial economy, and would have been in the children's best interests. Under the reasoning of *Pavelcik*, the evidence weighed heavily in favor of transfer to Cook County, and the circuit court abused its discretion by denying Deborah's request for transfer of venue.

Accordingly, this Court must reverse and remand this case, vacate all orders entered after December 11, 2003, and direct the circuit court to transfer the matter to Cook County.

C. The Circuit Court Erred In Failing To Transfer This Matter to Cook County, Pursuant to 735 ILCS 5/2-1001.5.

A circuit court's refusal to transfer a matter pursuant to this statute is reviewable for an abuse of discretion. *Gouker v. Winnebago County Bd. of Sup'rs*, 37 Ill.2d 473, 475 (1967). On January 11, 2007, Deborah petitioned to transfer venue to Cook County pursuant to 735 ILCS 5/2-1001.5, arguing that she would not receive a fair and impartial trial in front of Judge John Truitt (Vol. 2 of 5, R. C000457-000486). On January 29, 2007, the circuit court denied Deborah's motion. (Vol. 3 of 5, R. C000583). However, under Illinois law, the circuit court erred in denying Deborah's petition and in failing to transfer the matter to Cook County.

Regarding a transfer of venue based upon prejudice, the trial judge has no discretion as to whether the change will be granted if a proper and timely petition is filed, and the judge cannot inquire as to the truthfulness of the allegations of prejudice. In re *Marriage of Cummins*, 106 Ill.App.3d 44, 47 (2d Dist. 1982), *citing Rosewood Corp. v. Transamerica Ins. Co.*, 57 Ill.2d 247, 251 (1974). The right to a change of venue on account of the prejudice of a trial court is absolute as long as statutory requirements are met. *Joseph v. Joseph*, 15 Ill.App.3d 714, 718 (1st Dist. 1973). **The motion need not specify the basis of the charge of prejudice; a general allegation of a suspicion of prejudice is sufficient.** *Palmisano v. Connell*, 179 Ill.App.3d 1089, 1095 (2d Dist.1989) (only general allegations of prejudice are necessary and the petitioner has an absolute right to a substitution of judges). Moreover, any order entered after an improper denial of a change of venue is void. Cummins 106 Ill.App.3d at 47, citing *Sansonetti v. Archer Laundry, Inc.*, 44 Ill.App.3d 789, 798 (1st Dist. 1976).

Here, Deborah's petition satisfied the requirements to change venue under 735 ILCS 5/2-1001.5. (Vol. 2 of 5, R. C000457-486). Deborah alleged that she would not receive a fair trial as a result of the circuit court judge's prejudice. Specifically, Deborah alleged prejudice, as the judge would be unable to appoint a "neutral" Child Representative. (Vol. 2 of 5, R. C000457). Furthermore, Deborah alleged that Judge Truitt would be unable to handle matters such as case management, appointing a Child Representative, and moving the matter towards a hearing in a timely fashion. (Vol. 2 of 5, R. C000458). Deborah's Petition was supported by two (2) affidavits of residents of Winnebago County, as required by the statute. (Vol. 2 of 5, R. C000462-463).

Under express Illinois law, the circuit court had no discretion in refusing to transfer the matter, as Deborah's petition fully satisfied the requirements under the statute and provided specific allegations of prejudice. Any subsequent orders entered by the circuit court after its improper denial of transfer are void. Accordingly, this Court must reverse and remand the matter, vacate all orders entered after January 29, 2007, and direct the circuit court to transfer this matter to Cook County.

CONCLUSION

The foregoing demonstrates that the circuit court erred in (a) allowing Lorenzo's Counter-Petition for Change of Custody; (b) granting Lorenzo's Petition for an Order of Protection and entering an Emergency Order of Protection against Deborah; (c) repeatedly extending the Emergency Order of Protection against Deborah; (d) granting Lorenzo's Emergency Petition to Modify Custody and entering an emergency order transferring custody of the parties' minor children to Lorenzo; (e) applying the wrong standard at trial concerning custody; (f) making findings at trial concerning custody that were against the manifest weight of the evidence; (g) abusing its discretion in entering judgment denying Deborah any visitation whatsoever of the parties' minor children; (h) denying Deborah's Motion for Voluntary Dismissal; and (i) denying Deborah's motions to transfer venue to Cook County.

Accordingly, this Court should reverse and remand for further proceedings.

Respectfully submitted,

Petitioner-Appellant
DEBORAH ORLANDO COONEY,

By:/s/_____
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APPENDIX C

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

[Filed Jan. 7, 2008]

No. 93-D-1332

IN RE MARRIAGE OF DEBORAH ORLANDO COONEY,
Petitioner-Appellant,

v.

LORENZO ORLANDO,
Respondent-Appellee.

RULE 23 ORDER

On October 19, 2001, the petitioner, Deborah Orlando Cooney (Deborah), filed a postdissolution petition to remove the parties' two children to Ohio. On November 19, 2001, the respondent, Lorenzo Orlando (Lorenzo), filed a response to that petition and a counterpetition for change of custody. On June 20, 2007, the trial court granted Lorenzo's counterpetition. Deborah appeals from this order and from interlocutory orders entered during the pendency of the postdissolution proceedings. We affirm in part, reverse in part, and remand for additional proceedings consistent with this order.

BACKGROUND

Deborah and Lorenzo were married in Chicago in 1987. In 1989 Lorenzo's job required the parties to move to Rockford. Two children were born to the mar-

riage: Christopher, born on September 22, 1989, and Jonathan, born on December 29, 1991. On November 17, 1993, Deborah filed a petition for dissolution of marriage in Winnebago County. On February 8, 1994, a hearing was held at which findings were made as to the grounds for dissolution of marriage and, the proofs were closed on that issue. The trial court reserved entry of judgment at that time until all other issues had been resolved.

On June 21, 1995, Lorenzo filed a petition to terminate temporary maintenance on the basis that Deborah was living with another man on an ongoing conjugal basis. A hearing was held on November 7, 1995. On November 22, 1995, the trial court entered an order that indicated Deborah knowingly and intentionally waived her right to receive temporary and permanent maintenance in open court. The trial court thus entered an order that Deborah's right to receive maintenance from Lorenzo was "forever barred as of November 7, 1995."

On November 17, 1997, Deborah filed a motion to voluntarily dismiss her petition in Winnebago County. On September 18, 1997, the trial court entered an order allowing Lorenzo seven days to respond to the motion to dismiss. Although the order did not so reflect, the parties stipulated that on September 18, 1997, the trial court granted the motion to voluntarily dismiss. On September 25, 1997, Lorenzo sent a letter brief to the trial court judge, which does not indicate that it was filed in the circuit court, objecting to Deborah's motion to voluntarily dismiss. In that letter, Lorenzo argued that there had already been substantive orders, barring Deborah from receiving maintenance and three separate petitions for contempt citations against Deborah. On October 1, 1997,

Lorenzo filed a motion to reconsider the trial court's order granting Deborah's motion to voluntarily dismiss. The parties stipulated to an undated order denying the plaintiffs motion to voluntarily dismiss. Deborah alleged that this order was entered on November 24, 1997.

On November 25, 1997, Deborah filed a motion to transfer venue to Cook County for *forum non conveniens*. The motion was not resolved at that time, and proceedings in the dissolution case continued without objection. On June 15, 1998, the trial court entered a bifurcated judgment dissolving the parties' marriage. Deborah remarried in 1999 and Lorenzo remarried in 2002. On June 8, 1999, the trial court entered an order granting Deborah temporary sole custody of the boys subject to an attached co-parenting agreement of the parties. On September 18, 2001, the trial court entered an order resolving the remaining issues in the dissolution case such as maintenance, child support, and the distribution of marital assets. Additionally, this order granted permanent custody of the children to Deborah and incorporated the co-parenting agreement. Deborah filed a notice of appeal from this order. She later filed, and we granted, her motion to dismiss the appeal. See *In re Marriage of Orlando*, No. 2-01-1191, final order dated April 16, 2002.

On October 19, 2001, Deborah filed a petition to remove the children to Ohio where she and her new husband had built a home. On November 19, 2001, Lorenzo filed a response to the petition for removal and a counterpetition for change of custody. On August 29, 2002, the trial court entered an order denying Deborah's petition to remove. Lorenzo's counterpetition for change of custody remained pending.

On October 17, 2002, Attorney Kathryn Bischoff was appointed by the trial court to act as the children's representative, pursuant to section 506(a)(3) of the Illinois Marriage and Dissolution of Marriage Act (the Dissolution Act) (750 ILCS 5/506(a)(3) (West 2002)). On June 27, 2003, Bischoff sent a letter to counsel for the parties. In that letter, Bischoff indicated that she reviewed the case file, interviewed the parties and the children, and obtained information from collateral sources. Based on her investigation, Bischoff concluded that both parties love their children but they often let their animosity toward each other cloud their judgment, resulting in decisions that were not always in the best interest of the children. Bischoff concluded that the children were constantly caught in the middle of their parents incessant confrontations and disagreements. Additionally, she stated:

> "It is my opinion that [Lorenzo] has done a better job of putting the best interests of the boys first, whereas [Deborah] tends to look to the past and history and takes personal affront with [Lorenzo's] attempts to have more time with his children. Based on the foregoing, it is my opinion, that it is in the best interests of the children that custody be modified so they may reside with their father, subject to visitation with their mother."

On July 2, 2003, based on Bischoff's recommendation, Lorenzo filed a petition for temporary change of custody. On October 28, 2003, Deborah filed a petition for supervised visitation, indicating that Lorenzo had knowingly given Christopher dairy products, to which Christopher was allegedly allergic, causing him to be hospitalized.

On November 20, 2003, Lorenzo filed a motion to strike the plaintiffs November 25, 1997, motion for

transfer of venue. Lorenzo pointed out that the pursuant to section 4, subparagraph q, of the June 8, 1999, co-parenting agreement, the parties agreed as follows:

> "**** post-judgment venue shall remain in Winnebago County, Illinois, unless otherwise agreed to by [Lorenzo] as evidenced by a signed stipulation."

On November 25, 2003, Deborah filed a renewed motion to transfer venue to Cook County. In that motion, Deborah argued that pursuant to section 512(b) of the Dissolution Act (750 ILCS 5/512(b) (West 2002)), the trial court may in its discretion transfer matters involving a change in child custody to the judicial circuit where the minor or dependent child resides. Deborah indicated that she and the children had been residing in Cook County for many years and that Cook County would be a much more convenient forum for the children and the witnesses. On December 11, 2003, the trial court entered an order denying Deborah's motions to transfer venue.

On April 30, 2004, Deborah filed a motion requesting that a custody evaluator be appointed pursuant to section 605 of the Dissolution Act (750 ILCS 5/605 (West 2004)), "to investigate all relevant factors regarding custody of the minor children." On September 23, 2004, the trial court, pursuant to section 605 of the Dissolution Act, appointed Dr. Lyle Rossiter, M.D., to conduct an independent evaluation and make written recommendations concerning the custodial arrangements for the minor children.

Dr. Rossiter submitted his written report to Bischoff on June 10, 2005. In that report, Dr. Rossiter made findings, conclusions, and recommendations. Dr.

Rossiter indicated that as part of his evaluation he interviewed the parties and their children, Lorenzo's current wife, Deborah's parents, and a number of Deborah's friends. Deborah's current husband, Edward Cooney, was not personally interviewed but did complete a multimodal questionnaire. Additionally, Dr. Rossiter reviewed most but not all of Christopher's medical records; numerous motions, petitions, memorandums and orders filed and issued in this case; discovery depositions; e-mails between the parties; records pertinent to Deborah's and Lorenzo's financial situations; school records; and records of various DCFS investigations of the Orlando family. Dr, Rossiter's report did not indicate that he performed any psychological testing on Christopher or Deborah in his "Summary of Conclusions," Dr. Rossiter indicated that Christopher suffered from a delusional disorder characterized by irrational beliefs that his father was trying to harm or kill, him and that the disorder, was induced as a result of intense emotional pressure from his mother, Deborah, and his maternal grandparents, Rose and Raymond Wietrzykowski.

Dr. Rossiter further concluded that Deborah also suffered from a delusional disorder manifested by similar missbeliefs that Lorenzo was trying to harm Christopher. She also was delusionally convinced that Christopher suffered from one or more severe systemic medical disorders for which there was (a) no medical evidence, and (b) extensive medical documentation to the contrary. Dr. Rossiter further stated that:

> "[Deborah's] disorder has manifestted [sic] itself in intense and sustained hostility, manipulation, and misrepresentation of medical and other facts, lack of cooperation and mutuality in-custody and visitation arrangements, deliberate falsification

> of the onset, nature, duration, and course of the signs and symptoms of imagined disorders in Christopher, and deliberately false reports of malevolent actions by Lorenzo to various agencies including medical doctors, school teachers or administrators, DCFS, and law enforcement authorities."

Dr. Rossiter explained that Deborah's and Christopher's delusions were also held by Deborah's parents, who described Lorenzo as a sociopath who continued to be a homicidal threat to Christopher and bent on ruining the lives of Deborah and her parents.

To the contrary, Dr. Rossiter stated that his examination revealed that, despite earlier personality faults, Lorenzo had become a dedicated and loving father who had made strenuous efforts over the past nine years to remedy his earlier neglect of the children and to counter the destructive effects of. Deborah's household on Christopher and Jonathan. Dr. Rossiter found that despite Lorenzo's efforts; Deborah and her parents had created an unusually toxic environment in which Christopher had developed a delusional disorder. Jonathan had also suffered serious but less devastating harm in the environment, in which he developed a "conduct disorder."

Dr. Rossiter further opined that Deborah's influences resulted in a complete parental alienation syndrome in which Christopher was so delusionally fearful of his father that he refused to see him at all. Christopher's mental illness constituted a Munchausen's-by-proxy syndrome that resulted from the immense emotional pressure put upon him by Deborah and her parents. He believed that the actions of Deborah and her parents toward Christopher formed a chronic pattern

of mental and emotional child abuse reportable to the proper authorities.

Dr. Rossiter recommended that Christopher and Jonathan be placed in immediate temporary custody of Lorenzo and ultimately in his permanent custody. He also recommended that Christopher be immediately admitted to a nearby psychiatric hospital and evaluated for a delusional disorder, parental alienation syndrome, and Munchausen's-by-proxy syndrome. He further stated that, in order to interrupt the dominant influence of Deborah and her parents on Christopher, they should be prohibited from visiting with him in the hospital. The hospitalization should be construed as a transition process in preparation for Christopher living with Lorenzo. Following Christopher's release from the hospital, Dr. Rossiter recommended that visitation with Christopher by Deborah and her parents be brief and closely supervised so that no further delusional beliefs were shared with Christopher. Dr. Rossiter also recommended that Deborah and her parents seek immediate psychiatric treatment. Finally, Dr. Rossiter warned that the type of delusional disorders in this case carried an increased risk for violence, including violence directed toward the self, not just those perceived as the villains. He believed that once Deborah and her parents were aware of his opinions, that abduction of the children was a possibility.

On June 14, 2005, Bischoff submitted Dr. Rossiter's report to the trial court and-to the parties' attorneys. On that day, the trial court issued a protective order that the lawyers were not to release a copy of or any information concerning Dr. Rossiter's report to their clients. The trial Court also compelled the parties and

the children to appear in court June 15, 2005, without any explanation for the mandate.

On June 15, 2005, the parties appeared in court and were provided copies of Dr. Rossiter's report which they were permitted to read while in court. Lorenzo filed a petition for an order of protection and an emergency petition for temporary change of custody. Deborah's attorney objected on the basis that Deborah had not received 10 days' notice pursuant to section 605 of the Dissolution Act and was being denied her constitutional right to cross-examine Dr. Rossiter. The trial court marked Dr. Rossiter's report as the Court's Exhibit No. 1 and admitted it into evidence. No testimony or other evidence was taken. The trial court stated:

> "I find the report to be very thorough as it was prepared by Dr. Rossiter, a very comprehensive report, contains very serious and disturbing conclusions and recommendations; which I accept, and based upon the report and your argument and representations by counsel today I will grant an emergency order of protection in favor of [Lorenzo], against [Deborah], and will award to him the temporary custody of the two children, ***, as suggested by counsel."

The trial court ordered that Christopher be brought immediately to the hospital for psychological evaluation. The trial court set the hearing on a plenary order of protection for June 29, 2005. The trial court clarified that it was granting both an emergency order of protection and Lorenzo's petition for temporary change of custody, and that both were set for status on June 29. An emergency order of protection was entered on that day, indicating that Deborah was denied visitation with Christopher and Jonathan. The

trial court also entered an order on that date granting Lorenzo's emergency petition for temporary change of custody. That order indicated that visitation with Jonathan was denied and that visitation with Christopher was pursuant to the emergency order of protection—which denied visitation.

There were thirty extensions of the emergency order of protection between June 29, 2005 and December 12, 2006. Most of the extensions were agreed to by the parties. On September 1, 2005, Judge Steven L. Nordquist, the judge who had presided over the case since early 1998, sent a letter to the parties indicating that he had been reassigned to Boone County and that on the court's own motion he was reassigning the case to judge John R. Truitt. The letter further indicated that the cause had been set for status on September 8, 2005, and that Judge Truitt was unavailable that day. As such, the court reset the case for status on September 22, 2005, before Judge Truitt. The trial court entered an order dated September 2, 2005, continuing the emergency order of protection until September 22, 2005.

On July 5, 2005, Deborah filed a petition for rehearing on the trial court's June 15, 2005, orders granting the emergency order of protection and Lorenzo's emergency petition for temporary change of custody. On September 14, 2005, Deborah filed a motion to vacate the emergency order of protection. In that motion, Deborah argued that pursuant to section 220(e) of the Domestic Violence Act (750 ILCS 60/220(e) (West 2004)), an emergency order of protection can only-be extended in open court. Deborah therefore maintained that Judge Nordquist's *sua sponte* extension from September 8 to September 22 was in violation of the statute. Additionally, she pointed out that

the trial court docket indicated that the parties were in court on August 23, 2005, and agreed to extend the status to September 8, 2005. However, she argued that the parties were not in fact in court and that her attorney had attended a funeral that day. On September 22, 2005, following a hearing, the trial court denied the petition for rehearing and the motion to vacate the emergency order of protection. On October 3, 2005, Deborah filed a notice of appeal from that order. On November 7, 2005, we dismissed the appeal for lack of jurisdiction because it was untimely. See *In re Marriage of Orlando*, No. 2-05-0985, final order dated November 7, 2005.

Thereafter, status on the emergency order of protection and the emergency petition for temporary change of custody was continually extended by agreement of the parties. Ultimately, on December 12, 2006, by agreement of the parties, the trial court vacated the emergency order of protection. On that same day the trial court entered: a "no contact" order barring Deborah from visiting Christopher and Jonathan or going near their home, school, or place of employment.

On December 19, 2006, Attorney Bischoff filed a motion to withdraw as the child's representative. The trial court granted that motion. On January 11, 2007, Deborah filed another motion for change of venue, arguing that she could not receive a fair and timely trial in Winnebago County. On January 29, 2007, the trial court denied the motion for change of venue and appointed Attorney Janet Fuenty to serve as the child's representative. A trial on Lorenzo's counterpetition for change of custody commenced on June 4, 2007.

At the start of the trial, Deborah made an oral motion to dismiss the counterpetition because the allegations were conclusory. Deborah argued that the counterpetition only alleged that, she concealed her intent to move to Ohio during the dissolution proceedings, and that, therefore, evidence of any events occurring subsequent to the filing of the counterpetition could not be admitted at trial. Deborah acknowledged that if the counterpetition was amended, Lorenzo could admit evidence of events occurring subsequent to the filing of the counterpetition. The trial court denied the oral motion to dismiss. The trial court noted that Deborah had ample time to challenge the pleadings; that there was no surprise or prejudice because, since the filing of the counterpetition, there had been extensive discovery and interrogatories had been exchanged; and that the rules of pleading and proof were not to be as strictly construed when dealing with the concept of the best interest of the children. Thereafter, trial commenced. The trial lasted approximately two weeks and the trial court heard the testimony of approximately 13 witnesses. The following is a brief recitation of the testimony that is relevant to the issues raised in this appeal.

Lorenzo testified that he and Deborah entered into a co-parenting agreement in 1999. Pursuant to the agreement, among other things, he was to have visitation with the children every other weekend, holiday visitation was to be determined by agreement, and he was to have phone communication four times a week. From the beginning, Deborah did not comply with the agreement in that she failed to keep him apprised of the children's progress in school and their health conditions. After he filed his counterpetition for change of custody, compliance with the visitation requirements of the coparenting agreement became worse.

Lorenzo testified that Deborah did not allow him visitation for the first quarter of 2002. In June of 2003 he was denied visitation because Jonathan was hospitalized after being hit by a car. Deborah did not tell Lorenzo where Jonathan was hospitalized. He called every hospital in Chicago until he found him. He then went to visit Jonathan in the hospital. Additionally, he only saw Christopher twice between October 2003 until June 15, 2005, both times when he was dropping Jonathan off. October 2003 is when Deborah and Christopher accused him of poisoning Christopher by feeding Christopher milk products despite Christopher's alleged milk allergy.

Lorenzo further testified that on June 2, 2004, the Winnebago County trial court entered an order granting him visitation with both boys from June 4, 2004, through July 2, 2004. He arranged to bring the boys home following Christopher's eighth grade graduation ceremony in Chicago. When he parked his car at the school, he was surrounded by police officers and presented with an order of protection that Deborah had obtained that day in Cook County. The order of protection denied him any contact with Christopher. He showed the police officers the visitation order that was entered in Winnebago County. Nonetheless, he was not allowed to witness Christopher's graduation. The police officers pleaded with Deborah to allow Lorenzo to sit in the back of the Church to see the graduation. Deborah refused. He left Chicago with only Jonathan. Finally, Lorenzo testified that of the six or seven DCFS investigations that were instigated against him, presumably by Deborah, they were all determined to be unfounded.

Deborah testified that from 1998 until 2001, visitation was going well between Lorenzo and the chil-

dren. Lorenzo did not miss any visitation in 2002 or 2003. From the years 2000 until 2004 there were no pleadings on file indicating that Lorenzo missed any visitation. She informed Lorenzo whenever Christopher was hospitalized. In early October 2003, when Christopher and Jonathan returned home from visitation with their father, Christopher had sores all over his body and complained about a burning pain in his stomach. He was thereafter hospitalized for six days at the Resurrection Medical Center in Chicago. The hospitalization was caused by Lorenzo feeding Christopher milk products despite Christopher's milk allergy.

Deborah further testified that she had a daughter with her second husband named Caitlin. Caitlin was ten years old at the time of trial. Christopher and Jonathan had a good relationship with Caitlin prior to the emergency change of custody in June 2005. Deborah testified that she had a very good relationship with the boys. She took care of them, took them to school, fed them, and helped them with their homework, Deborah testified that Christopher and Jonathan loved her very much and would constantly hang on her.

Finally, Deborah testified that in 1995 Lorenzo was charged with eavesdropping for tape recording their phone conversations. Also around that time frame, Lorenzo had physically assaulted her second husband by grabbing him around the neck. Deborah related incidents of abusive behavior during her marriage to Lorenzo. One example was a time Lorenzo became upset because she ironed the wrong shirt for him so he called her a "bitch" and threw the shirt in her face. Another example was a time shortly after Christopher was born and she wanted to go grocery shop-

ping without Christopher. Lorenzo told her to make sure that Christopher was changed and fed before she left because he did not want to have to do anything while she was gone. She also testified that every morning getting up, if Lorenzo missed the alarm, he would scream at her and blame her for his being late for work.

Brian Klaung testified that he was a licensed clinical social worker who had been hired by Lorenzo on June 23, 2005, to provide counseling to Christopher and Jonathan Lorenzo requested that Deborah stipulate to the fact that Klaung was an expert. Deborah refused to stipulate and indicated that whether Klaung was an expert or an opinion witness was irrelevant since either way the issue was the probative value or the weight to be given to his testimony. The trial court found Klaung to be qualified as an expert in the areas to which he testified and indicated that it would determine the weight to be given to his testimony

Klaung testified that, with respect to Christopher and Jonathan, he was convinced with a "complete degree of certainty" that three conditions were operating simultaneously, namely, parental alienation syndrome, Munchausen-by-proxy syndrome, and a delusional disorder. Klaung testified that Christopher suffered from parental alienation syndrome to a greater degree than Jonathan. He further testified that the delusional disorder developed because the boys were convinced over time by Deborah that Lorenzo was going to harm and kill them. Klaung also testified that he was convinced within a reasonable degree of medical certainty that Deborah and her parents were delusional.

Klaung further testified that if custody of the children were to be returned to Deborah, Christopher was at risk for going right back to pleasing her through feigning illness and developing all kinds of nonexistent illnesses. He believed that Jonathan would become enraged, would act out, and would likely end up in the criminal justice system. Klaung testified that based on his experience working for DCFS, his clinical experience in terms of the impact of severe abuse on children, and the level of sophistication that the abuse had taken, he would not recommend even supervised visitation because he did not think there was "a person who ha[d] the skills to be able to supervise contact between these boys due to the severity of the abuse that has occurred." Additionally, Klaung testified that visitation would cause the boys' treatment to be impaired to the extent that Jonathan would become angry and Christopher would regress with respect to the autonomy and self-esteem that he had established.

Dr. Rossiter testified substantially in conformity with his report dated June 10, 2005. He concluded that Deborah and her parents were afflicted with a delusional disorder, parental alienation syndrome, and Munchausen's-by-proxy syndrome.

Dr. Allen M. Jaffee, a professor of psychiatry at Northwestern University, testified that he had administered an MMPI-II test to Deborah in October 2006. He testified that the MMPI-II test was a very reliable test for psychological assessment. Deborah scored in the normal range on the validity portion of the test which indicated that she was telling the truth on the test. Dr. Jaffee further testified that on the MMPI-II scale relating to hypochondriosis, Deborah scored in the low-normal range, which indicated that

she did not suffer from Munchausen-by-proxy. The results of the MMPI test also contained no indication that Deborah suffered from a delusional disorder.

Dr. Jaffee further testified that Dr. Rossiter's report indicated a confirmatory bias. Dr. Jaffee testified that Dr. Rossiter spoke with Lorenzo's wife, Laurie, on two occasions prior to being appointed as the section 605 evaluator. Dr. Jaffee thought it was unethical that Dr. Rossiter did not disclose this communication in his report. Dr. Jaffee's opinion that a confirmatory bias existed was also based on his belief that Dr. Rossiter was missing two to three years of Christopher's medical records, did not utilize psychological testing such as the MMPI-II, and diagnosed Deborah's parents as delusional, based on a 30-minute phone conversation. Dr. Jaffee also pointed out that Dr. Rossiter's report mentions an emotional breakdown of Christopher and subsequent hospitalization but that Dr. Rossiter never obtained the medical records for that hospitalization. Finally, Dr. Jaffee testified that he gave Deborah the Ackerman, Schoendorf Parenting Effectiveness for Custody Test (ASPECT) and that the test was extremely reliable. The results showed that Deborah had a high level in terms of her ability to parent.

On cross-examination, Dr. Jaffee admitted that he did not conduct the interviews that Dr. Rossiter conducted and he did not review all the medical records that Dr. Rossiter reviewed. Additionally, he never interviewed Lorenzo, the children, or Deborah's parents. He admitted that clinical interviews provide a great deal of information. He also admitted that Dr. Rossiter's report did not specifically indicate that there were two years of missing medical records. Dr. Jaffee also testified that he never reviewed Deborah's

DCFS records and did not do a custody evaluation. He testified that if he had performed a custody evaluation, he would have looked at everything that Dr. Rossiter looked at and would have relied on the records provided by the parties and their attorneys, just as Dr. Rossiter did.

Dr. David Hansen testified that he had been the children's treating physician since June 2005. He testified that niany of Christopher's alleged illnesses did not exist. Lab testing showed that Christopher had no milk or peanut allergies. He testified that Christopher had no porphyria in the last two years. Finally, he testified that he had not treated Christopher for asthma in the last two years. However, that did not mean that Christopher did not have asthma since asthma was a variable disease that could come and go.

The trial court conducted *in camera* interviews with Christopher and Jonathan. Christopher stated that he was currently living with his father, stepmother, and brother and that everything was going "great." If he was making the custody decision, he would order that he and Jonathan remain in the custody of Lorenzo. He felt that he was abused for years by his mother and that when he moved in with his father, he was finally able to experience a normal life. He was no longer seeking constant medical attention, he was attending and doing well in school, and he was working.

When asked if he had ever been told what to say when speaking with a judge, he recalled a couple instances. The first was when he was still living in Rockford with his mother. While he was visiting his father, his father's girlfriend's son threw a chalk cube from a pool table at him. It hit him in the face and he

had a bruise. When he went home to his mom, she immediately took him to the public safety building where his mom convinced him and others that Lorenzo had punched him in the face. He ended up talking with a judge in chambers and he went along with his mother's story that Lorenzo punched him in the face. He also remembered another time when he returned from visitation and his mother took him to the police station where she made him say that Lorenzo's wife, Laurie, had tried to run him over when he was riding his bike home from the park.

Finally, Christopher stated that when he was first told to live with his father, he was worried about how he would be treated since he had spent the previous three years "going in and out of police stations getting orders of protection renewed under completely falsified information." Now that he had lived with his father for two years, the relationship was good. He and his father actually had conversations and spent time together. His father was someone he depended most on and would go to if he ever had any problems.

Jonathan stated that he was currently living with his father, stepmother, and brother and that he "loved it there." He felt like he had a good family, he felt safe, and they did fun things together. They also ate dinner together every night and they always talked. He felt like he could say anything because his father and stepmother always listened to him. Now that he lived with his father, he received good grades and had been captain of the football team for two years in a row. If he were the one making the custody decision he would choose to stay with his father. When he lived with his mother he was not doing well in school, was always getting into trouble, and he did not really have a family. His mother worked all the

time and was hardly ever home. When she was home, all she talked about was her house in Ohio and how she could get more hours at work.

With respect to visitation, Jonathan said that he did not want to see his mother and that the thought of visitation made him sick to his stomach. Christopher said that he would not want any visitation with his mother and that he did not think it was in the best interest of either he or Jonathan to have visitation.

The trial court entered a memorandum of decision on June 20, 2007. The trial court considered all the testimony, exhibits, and other pleadings. The trial court found the testimony of Lorenzo to be credible and truthful. The trial court found Deborah to be less credible. Her answers were evasive and she appeared defensive. The trial court also found that Deborah's father was not credible. The trial court found all the other witnesses credible.

The trial court explained that Lorenzo bore the burden of proving by clear and convincing evidence that a change had occurred in the circumstances of the children and that the modification of custody was necessary to serve the best interest of the children. The trial court found that a change of circumstances had been established. Specifically, both parties had remarried, the minor children were then 17 and 15 years of age, the co-parenting agreement had not been fully complied with, and the custody of the children had been temporarily transferred to Lorenzo.

The trial court also determined that a modification of custody was necessary to serve the best interests of the children. The trial court stated that it considered all relevant factors including the factors set forth in section 602 of the Dissolution Act (750 ILCS 5/602

(West 2006)). As to the first factor, the trial court noted that each party wanted custody of the children. As to the second factor, the wishes of the children, the trial court found their *in camera* statements to be forthright, open, and honest. Both children were unequivocal in their preference and desire to continue living with their father. The trial court gave serious weight to this factor because the children were mature and had a sound basis for their desire to remain with their father.

As to the third factor, the interaction and the interrelationship of the boys with their parents, the trial court found that the testimony reflected that the children had a good relationship with their father and stepmother. The trial court also noted that Deborah testified that when she had custody of the boys, her relationship with them was also good. As to the fourth factor, the trial court found that Christopher and Jonathan had adjusted well to their home and school since the transfer of custody on June 15, 2005.

As to the fifth factor, the mental and physical health of the all individuals involved, the trial court noted that Klaung had testified that the boys would be at risk if custody was returned to Deborah. Klaung testified to his concerns that Christopher would feign illness and that Jonathan would become enraged. Although the trial court found that much was made throughout the trial as to whether Christopher's illnesses were real, the trial court did not believe it was necessary to determine whether Munchausen's-by-proxy existed in making its custody determination. The trial court noted that Dr. Rossiter and Dr. Jaffee were in disagreement on that point. What the trial court found significant was that Christopher's

doctor and hospital visits had decreased dramatically since the time that custody was transferred to Lorenzo. Also significant was that, on multiple occasions, when Deborah disagreed or took exception to a doctor's diagnosis as to a medical condition of Christopher, she would seek out and consult other doctors. The trial court noted that both children appeared to be happy and healthy in their present situation.

As to the sixth factor, the trial court did not find anything significant as to physical violence or the threat of physical violence by the children's potential custodians. As to the seventh factor, the occurrence of ongoing abuse, the trial court noted that Lorenzo had plead guilty to a charge of attempt eavesdropping for illegally taping phone conversations with Deborah and had, at one point, physically assaulted Deborah's husband Edward Cooney. The trial court noted that although these facts were considered, they were not given significant weight as to the best interests of the children.

As to the eighth factor, the willingness and ability of each parent to facilitate and encourage a close and continuing relationship, the trial court noted that the evidence showed that when Deborah was the sole custodian, she unreasonably denied and frustrated visitation between Lorenzo and the boys. The evidence also showed that she did not comply with the parties' co-parenting agreement. She did not inform Lorenzo of the boys' school activities or of their medical treatment. The trial court also found that the evidence showed that Deborah attempted to alienate the children from their father. The trial court determined that if custody was returned to Deborah, she would not facilitate a close and continuing relationship between the children and Lorenzo. Based on all this

evidence the trial court determined that it was in the boys' best interest that permanent custody be modified, and granted Lorenzo's counterpetition for change of custody.

With respect to visitation, the trial court noted that both children unequivocally indicated that they did not wish to have visitation with their mother. The trial court also noted that a non-custodial party is entitled to reasonable visitation rights unless the trial court finds that visitation would seriously endanger the children's physical, mental, moral, or emotional health. The trial court explained that Klaung testified that visitation should not occur until Deborah's delusional disorder was resolved and that in the absence of treatment, Deborah would continue to attempt to alienate the boys from their father. Klaung had further testified that visitation would impair the boys' treatment and that no person could adequately supervise visitation. The trial court believed that Deborah would use visitation to attempt to alienate the children from their father. As such, from all the evidence presented in the case, the trial court determined that visitation would seriously endanger the boys' mental and emotional health. Visitation was denied until such time as Deborah successfully underwent intensive psychotherapy and the boys had progressed in their treatment to the point that visitation would not seriously endanger their well-being. The trial court did not order Deborah to undergo any treatment. Following the denial of her motion for reconsideration, Deborah filed a timely notice of appeal.

Deborah raises eight issues on appeal. Specifically, Deborah argues that (1) Lorenzo's counterpetition for change of custody was invalid because it was filed

without leave of court within two years of the custody judgment; (2) the trial court erred in entering and repeatedly extending the emergency order of protection; (3) the trial court erred in granting Lorenzo's emergency petition for temporary change of custody; (4) the trial court applied the wrong standard of proof at the final custody hearing; (5) the trial court abused its discretion in granting Lorenzo's counterpetition for change of custody; (6) the trial court abused its discretion in denying her any visitation; (7) the trial court erred in denying her motion for voluntary dismissal; and (8) the trial court: in denying her motions to transfer venue Cook County.

ANALYSIS

At the outset we note that during the .pendency of this appeal, the parties' oldest son, Christopher attained majority and the issues of custody and visitation are therefore moot as to him. See *In re Marriage of Smith*, 114 Ill. App. 3d 47, 48 (1983) (issue of custody is moot as to a child that has attained majority); see also *In re Marriage of Casarotto* 316 Ill. App. 3d 567, 571 (2000) (the circuit court lacks jurisdiction to enter a visitation order against a person who has attained majority).

I. Validity of the Counterpetition for Change of Custody

Deborah's first contention is that Lorenzo's counterpetition for change of custody is a nullity because it was filed without leave of court within two years of the original custody judgment, in violation of section 610(a) of the Dissolution Act (750 ILCS 5/610(a) (West 2000)). We agree that Lorenzo's counterpetition for change of custody was filed within two years of the original custody judgment. Although a bifur-

cated judgment dissolving the parties' marriage was entered on June 15, 1998, the final judgment on all remaining issues was entered on September 18, 2001. This order incorporated the co-parenting agreement awarding sole custody to Deborah. Two months later, on November 19, 2001, in response to Deborah's petition to remove, Lorenz filed a counterpetition for change of custody.

> Section 610(a) of the Dissolution Act (750 ILCS 5/610(a) (West 2000)), requires that: "(a) Unless by stipulation of the parties, no motion to modify a custody judgment may be made earlier than 2 years after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe the child's present environment may endanger seriously his physical, mental, moral or emotional health."

In the present case, Lorenzo did not file a section 610(a) affidavit. However, this does not render the trial court's determination on the petition a nullity. First, failure to file an affidavit in accordance with section 610(a) of the Act does not render a judgment subsequently entered void for lack of jurisdiction. *In re Custody of Sexton*, 84 Ill. 2d 312, 320-21 (1981). Additionally, Deborah never filed an objection to Lorenzo's failure to file an affidavit. The affidavit requirement was therefore waived. See *Sexton*, 84 Ill. 2d at 321-22. Moreover, although the petition for change of custody was filed within two years of the original custody judgment, the hearing on the merits did not occur until six years later. As such, any procedural defect with respect to Lorenzo's compliance with section 610(a) of the Dissolution Act was rendered moot. See *In re Marriage of Stevens*, 183 Ill. App. 3d 160, 162 (1989) (petition for change of

custody was filed within two years of original custody judgment; reviewing court held that where two of the three days of the custody hearing were held after the expiration of the two-year statutory period, the need to comply with the requirements of section 610(a) of the Dissolution Act was obviated); *In re Custody of Dykhuis*, 131 Ill. App. 3d 371, 373 (1985) (petition for change of custody was filed within two years of the original custody judgment and did not allege the proper statutory grounds under section 610(a) of the Dissolution Act; reviewing court held that because the hearings on the petition took place after the two year period terminated, the court could proceed under the best interests of the child standard (section 610(b) of the Dissolution Act)).

II. Emergency Order of Protection

Deborah's second contention is that the trial court erred in entering an emergency order of protection against her on June 15, 2005, without making the findings required by section 214(c)(3) of the Domestic Violence Act of 1986 (the Domestic Violence Act) (750 ILCS 60/214(c)(3) (West 2004)), and in repeatedly extending the order of protection between June 2005 and December 2006 in violation of the requirements of sections 220(a) and 220(e) of the Domestic Violence Act (750 ITS 60/220(a), (e) (West 2004)). Even assuming that these arguments have merit, we can provide Deborah no relief because, by agreement of the parties, the trial court vacated the emergency order. of protection on December 12, 2006, leaving no further relief available. See *Hedrick-Koroll v. Bagley*, 352 Ill. App. 3d 590, 592 (2004) (because the emergency and plenary orders of protection had expired by the time of appeal, issues relating to whether or not the orders were properly entered became moot).

Nonetheless, Deborah argues that the emergency order of protection tainted the outcome of the custody proceeding because, by the time of the custody hearing, she had not had contact with her sons for two years. In making its custody determination, the trial court considered the wishes of Christopher and Jonathan. Deborah argues that both children testified that they preferred to remain with their father because they had grown comfortable in that environment. However, we find Deborah's argument that the outcome of the custody proceedings would have been different had the emergency order of protection not been extended to be without merit. At the time the order of protection was entered, the trial court also entered an order granting Lorenzo's emergency petition for temporary change of custody. That order specified that Deborah was to have no contact with Jonathan and that contact with Christopher was pursuant to the order of protection, which denied visitation. Additionally, when the order of protection was eventually vacated on December 12, 2006, the trial court simultaneously entered an order barring Deborah from having any contact with her children. As such, even if the emergency order of protection was vacated sooner, the record shows that Deborah still would not have had visitation with her children because of the order granting Lorenzo's emergency petition for temporary change of custody.

III. Emergency Petition for Temporary Change of Custody

Deborah's third contention on appeal is that the trial court erred in granting Lorenzo's emergency petition for temporary change of custody on June 15, 2005. Specifically, Deborah argues that the trial court's determination was in error because: (1) she was not

afforded a hearing; (2) the evidence did not support such an order; and (3) she was not given Dr. Rossiter's report at least ten days prior to the June 15th hearing as required by section 605(c) of the Dissolution Act. Deborah argues that she was denied due process, the errors tainted the outcome of the final custody proceeding, and the trial court's June 20, 2007, order should therefore be vacated.

We need not reach the merits of this argument. Even if the trial court erred in granting Lorenzo's petition for temporary change of custody, it would not warrant the reversal of the trial court's June 20, 2007, custody determination. See *In re Marriage of Gordon*, 233 Ill App. 3d 617, 642-44 (1992) (despite trial court errors in granting a temporary order, where no appeal was taken from the temporary order and, subsequently, a complete and final hearing was held, the initial errors did not justify reversal of the final determination). The June 15, 2005, order was a temporary custody order pursuant to section 603(a) of the Dissolution Act (750 ILCS 5/603(a) (West 2004)). Temporary custody orders must be appealed on an interlocutory basis as provided for in the supreme court rules. *In re Marriage of Kostusik*, 361 Ill. App. 3d 103, 108 (2005). Once a permanent custody order is entered, the temporary custody order is superseded. *Kostusik*, 361 Ill. App. 3d at 108. Moreover, once the trial court enters a final custody order, an assumption-arises that the trial court has adjusted for any inequity in its temporary orders. *In re Marriage of Fields*, 283 Ill. App. 3d 894, 901 (1996).

The record reveals that Deborah did attempt to appeal the June 15, 2005, order granting the temporary change of custody but that the appeal was dismissed for lack of jurisdiction because it was un-

timely. Supreme Court Rule 306(b) required that a petition for leave to appeal be filed from an interlocutory order within five business days of the "entry or denial of the order from which review is being sought." See 210 Ill. 2d R. 306(b). Deborah, did not file a notice of appeal until October 3, 2005, following the September 22, 2005 denial of her motion for reconsideration. Deborah's motion for reconsideration did not toll the time to file her appeal. See *Odom by Odom v. Bowman*, 159 Ill. App. 3d 568, 571 (1987). Accordingly, since Deborah did not perfect an interlocutory appeal from the temporary custody order and a final custody hearing has been held, any denial of Deborah's due process would not justify reversal of the final custody order. See *Gordon*, 23.3 Ill. App. 3d at 642-44.

IV. The Appropriate Standard of Proof at the Custody Hearing

Deborah's fourth contention on appeal is that the trial court applied the wrong Standard in making its final custody determination. Specifically, Deborah argues that the trial court erroneously applied the "best interests of the children" standard required by section 610(b) of the Dissolution Act rather than the proper "serious endangerment to the children" standard required by section 610(a) of the Dissolution Act. However, as explained in response to Deborah's first contention, despite the fact that Lorenzo's petition was filed less than two years after the original custody determination, the hearing on the custody petition took place six years later, thus allowing the trial court to proceed under the best interests of the children standard. See *Stevens*, 183 App. 3d at 162; *Dykhuis*, 131 Ill. App. 3d at 373. Under section 610(b), a court may modify a prior custody judgment

if (1) there is clear and convincing evidence that a change has occurred in the circumstances of the child and (2) modification of custody is necessary to serve the best interest of the child. 750 ILCS 5/610(6) (West 2006). The trial court properly applied this standard.

V. Counterpetition for Change of Custody

Deborah's fifth contention on appeal is that the trial court abused its discretion in granting Lorenzo's counterpetition for change of custody. Deborah argues that the evidence at the hearing should have been limited to the pleadings, there was not clear and convincing evidence of a change in circumstances, and the trial court's determination was not in the best interests of the children. The standard of review for custody modifications judgments is the manifest weight of the evidence. *In re Marriage of Bates*, 212 Ill. 2d 489, 515 (2004). The trial court is in the best position to review the evidence and to weigh the credibility of the witnesses. *Bates*, 212 Ill. 2d at 515. In determining whether a judgment is contrary to the manifest weight of the evidence, the reviewing court views the evidence in the light most favorable to the appellee. *Bates*, 212 Ill., 2d at 516. Where the evidence permits multiple reasonable inferences, the reviewing court will accept those inferences that support, the court's order. *Bates*, 212 Ill. 2d at 516. A custody determination inevitably rests on the parties' temperaments, personalities, and capabilities, and the witnesses demeanor; *In re Marriage of Spent*, 342 Ill. App. 3d 643, 6.52 (2003). Accordingly "[a] custody determination, in particular, is afforded 'great deference' because 'the trial court is in a superior position to judge the credibility of the witnesses and determine the best interests of the child.'" *Bates*, 212 Ill.

2d at 516, quoting *In re Marriage of Gustayson*, 247 Ill. App. 3d 797, 801 (1993).

When making a determination as to the modification of child custody, the trial court should consider all relevant factors, including those listed in section 602(a) of the Dissolution Act (750 ILCS 5/602(a) (West 2006)), and decide what custodial order serves the child's best interest. *Spent*, 342 Ill App, 3d at 652. Section 602(a) provides that the court shall consider all relevant factors, including: "(1) the wishes of the child's parent or parents as to his custody; (2) the wishes of the child as to his custodian; (3) the interaction and interrelationship of the child with his parent or parents, his siblings and any other person who may significantly affect the child's best interest; (4) the child's adjustment to his home, school and community; (5) the mental and physical health of all individuals involved; (6) the physical violence or threat of physical violence by the child's potential custodian, whether directed against the child or directed against another person; (7) the occurrence of ongoing abuse * * * ; and (8) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child." 750 ILLS 5/602(a) (West 2006). Section 602 does not require a court to give equal weight to each factor. *In re Guardianship of Alexander O.*, 336 Ill. App. 3d325, 334 (2003). How much weight a court affords each factor will depend upon the circumstances of each particular case. *Alexander O.*, 336 Ill. App: 3d at 334. The factors enumerated in section 602(a) are not exclusive. *In re Marriage of Gambia and Woodson*, 367 Ill. App. 3d 441, 464 (2006).

A. Proper Evidence

In the present case, Deborah first argues that the evidence at the hearing on the counterpetition for change of custody should have been limited to the pleadings and that the only relevant allegation in the counterpetition was that Deborah concealed an intent to move to Ohio. Deborah argues that Lorenzo's petition did not include allegations that Deborah interfered with Lorenzo's visitation or that Deborah suffered from a delusional disorder, Munchausen by-proxy syndrome, or parental alienation syndrome. As such she argues that evidence of the foregoing should not have been permitted at the hearing on the counterpetition

> In his November 19, 2001, petition for change of custody, Lorenzo alleged as follows:
>
> "5. [Deborah] has repeatedly made misrepresentations of fact to this Court, including the concealment of her true intentions to remove the parties minor children from the state of Illinois.
>
> 6. The physical, mental, and emotional well, being of the parties minor children will be seriously jeopardized if the children remain in the custody of [Deborah].
>
> 7. Further, the parties minor children have expressed a desire *** to be in the custody of their father, ***.
>
> 8. It is in the best interest of the parties minor children that they be awarded to the sole, exclusive, care, custody, control, and education of their father ***"

We agree with Deborah that the allegations of the petition do not indicate that its basis was Deborah's alleged interference with Lorenzo's visitation or her alleged mental illnesses and abuse of the children.

Nonetheless, we do not find the insufficiency of the allegations in the counterpetition to be reversible error. The concern in a custody proceeding is always the best interest of the child. *In re Marriage of Noble*, 192 Ill. App. 3d.501, 508 (1989). Where the parties have had an opportunity to present evidence concerning the child's best interest, it would be senseless to exalt form over substance and remand for failure to file a proper pleading or affidavit. *Noble*, 192 Ill. App. 3d at 508.

In *Noble*, the petitioner filed a petition for modification of child custody less than two months after the custody judgment. *Noble*, 192 Ill. App. 3d at 506, The respondent filed a motion to dismiss on the basis that the petitioner failed to allege facts demonstrating a basis for modification under section 610(b) of the Dissolution Act. *Noble*, 192 Ill. App. 3d at 505. The trial court treated it as a motion to dismiss based on section 610(a) and denied it. *Noble*, 192 Ill. App. 3d at 507. In doing so, the trial court made no reference to the requirements of section 610(a). *Noble*, 192 Ill. App. 3d at 507. On appeal, the respondent argued that the trial court erred in denying her motion to dismiss because the petitioner did not file a section 610(a) affidavit or allege that the child's present environment seriously endangered his well-being. *Noble*, 192 Ill. App. 3d at 506.

The reviewing court noted that whether or not the respondent waived the petitioner's failure to comply with section 610(a) was a close issue because the respondent did object in the trial court, albeit off the mark, and because the petition did not allege that the child's present environment endangered his well-being. *Noble*, 192 Ill. App. 3d at 507-08. Nonetheless, the reviewing court determined that the respondent's

objection to the petitioner's failure to comply with section 610(a) was waived by her participation in the custody modification hearing and her failure to cite the correct statute in support of dismissal in the trial court. *Noble*, 192 Ill, App. 3d at 508. The reviewing court noted that where the parties have had an opportunity to present evidence concerning the child's best interest, it would be senseless to exalt form over substance and remand for failure to file a proper pleading or affidavit. *Noble*, 192 Ill. App. 3d at 508. Although the facts in *Noble* are different, the principle applies here. Because the parties participated in a full hearing in which both sides presented evidence, in the best interests of the children and in the interests of judicial economy we decline to remand this cause for Lorenzo to either amend or refile his counterpetition and have a whole new hearing on the same issues. See *Noble*, 192 Ill. App. 3d at 508.

Moreover, Deborah was not prejudiced by the insufficiency of the complaint. Generally, although a plaintiff is not required to prove his case at the pleading stage, he is required to allege sufficient facts to state all of the elements which are necessary to his cause of action, so as to inform a defendant of the claim against which he or she must defend. *Claire Associates by Livaditis v. Pontikes*, 151 Ill. App. 3d 116, 123 (1986); see also *In re Custody of Ayala*, 344 Ill. App. 3d 574, 586 (2003.) (due process of law requires that a party be accorded procedural fairness, *i.e.*, given notice and an opportunity to be heard). Here, although the original counterpetition did not allege sufficient facts, a hearing on the petition did not occur until six years later. During that time, there was extensive discovery, interrogatories were completed and depositions were taken. Additionally, the allegations that Deborah suffered from a delusional

disorder, Munchausen's-by-proxy syndrome, or parental alienation syndrome, were raised by Dr. Rossiter in his June 2005 report, approximately two years before trial commenced. By the time of trial Deborah was well aware of the allegations that Lorenzo was going to attempt to prove and was therefore, accorded procedural fairness.

Finally, Deborah had ample time to challenge the pleading but failed to do so until the day of trial, when she made an oral motion to dismiss the counterpetition as conclusory. Generally, where a complaint substantially but imperfectly alleges a cause of action, the defendant waives any objection by answering it without objection. *Gulley v. Noy,* 316 Ill. App. 3d 861, 865 (2000). This general rule is especially applicable when the defect in the pleadings can be remedied by amendment. *Gulley*, 316 Ill. App. 3d at 865. Here, on the day of trial, Deborah acknowledged that the insufficiency of the pleadings could easily be remedied by amendment. Although the record does not reveal that Deborah ever filed a formal answer to Lorenzo's counterpetition, her participation in discovery, interrogatories, and depositions; her request for a custodial evaluation; and her failure to challenge the sufficiency of the pleadings until six years later on the day of trial, manifested an intent to move forward on the petition and to overlook the insufficiency of the pleadings. As a general rule, objections to a pleading may be waived by any act which, in legal contemplation, implies an intent to overlook it. *Chimerofsky v. School District No. 63*, 121 Ill. App. 2d 371, 374 (1970). Under the circumstances in this case, by the time of trial, Deborah had waived her right to object to the sufficiency of the pleadings. Accordingly, the trial court did not err in considering evidence of Deborah's

interference with Lorenzo's visitation and her alleged mental illnesses and abuse of the children.

B. Clear and Convincing Evidence of a Change in Circumstances

Deborah next argues that there was not clear and convincing evidence of a change in circumstances. We disagree. The trial court explained that both parties had remarried, the children had advanced in age, there had not been compliance with the co-parenting agreement, and emergency custody of the children had been transferred to Lorenzo. Deborah argues that most of these events occurred after the petition was filed and that it was improper for the trial court to find a change in circumstances based on events that occurred after the filing of the petition. A similar argument was made in *In re Marriage of Eldert*, 158 Ill, App. 3d 798, 805 (1987).

In *Eldert*, the respondent argued that the trial court erred in finding a change in circumstances based on events that occurred after the petition for change of custody was filed. *Eldert*, 158111. App. 3d at 805. The *Eldert* court noted that in *Smart v. Smart*, 94 Ill. App. 3d 791, 794 (1981), the court held it was not error for the trial court to consider events occurring after a petition was filed, especially where there was judicial concern over the continuation of past deleterious conditions. *Eldert*, 158 Ill. App. 3d at 805. The *Eldert* court noted that although *Smart* was factually dissimilar, the judicial concern for the present and future needs of the child was the same. *Eldert*, 158 Ill. App. 3d at 806. Accordingly, the *Eldert* court determined that the trial court, in making a determination as to changed circumstances in a petition for modification of child custody, did not err in considering evidence of events that occurred after

the petition was filed but before the hearing. *Eldert*, 158 App. 3d at 806. Accordingly, in the present case, it was not error for the trial court to find a change in circumstances based on events that occurred after the filing of the petition for change of custody as those events necessarily affected the present and future needs of the children. See *Eldert*, 158 Ill. App. 3d at 806.

In so ruling, we note that Deborah argues that *Eldert* is distinguishable because in *Eldert*, the post-filing events were considered because there was a "judicial concern over the continuation of past deleterious conditions." *Eldert*, 158 Ill. App. 3d at 806. In *Eldert*, the petition included allegations that the mother allowed male friends to physically abuse the parties' son, used improper discipline, discussed physical aggression against the father with the minor child, and exposed the minor to acts of a sexual nature. *Eldert*, 158 Ill. App. 3d at 801. In the present case, Deborah argues that the petition did not include any allegations concerning her interference with visitation or her alleged mental illnesses and that it therefore did not establish any "past deleterious conditions." Deborah insinuates that the trial court could thus not consider post-filing events in the absence of any alleged deleterious conditions.

To the extent Deborah is arguing that *Eldert* is distinguishable on the basis that the *Eldert* petition was more specific and the present petition contained insufficient allegations, we have addressed that argument. Although the allegations in the counterpetition were insufficient, the hearing on the petition did not occur until six years later and Deborah was well aware of the allegations that Lorenzo was going to attempt to prove. As such, although not stated in the

complaint as in *Eldert*, past deleterious conditions were established in this case through discovery, depositions, interrogatories, and Dr. Rossiter's June 2005 report. Lorenzo's basis for modification of custody was the alleged mental and emotional injuries that Deborah caused the children and Deborah's interference with his right to visitation. Moreover, the point of *Eldert* is that in a custody modification proceeding, the court is concerned not only with past events, but also with the children's present and future needs. *Eldert*, 158 Ill. App. 3d at 806. "Custody litigation, unlike most other litigation, attempts to predict the future rather than to understand the past." Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 Yale L.J. 757, 762 (1985). Accordingly, the trial court must be able to assess all relevant facts in order to make a prediction as to a child's welfare.

Deborah also argues that it was error for the trial court to consider that temporary custody of the children had been granted to Lorenzo in determining that there was a change in circumstance. Furthermore, Deborah argues that it was the trial court that caused the hearing on the counterpetition for change of custody to be continued until two years after the temporary custody order had been granted and that the trial court could not, therefore, use this time differential against her. We find these arguments to be without merit. As explained, Deborah had the opportunity to perfect an interlocutory appeal as to the judgment granting temporary custody to Lorenzo but failed to do so. Furthermore, the record shows that all the parties agreed to the majority of continuances and delays in this case. As such, the trial court was not solely responsible for the two-year lag between the emergency petition for change of custody and the

hearing on Lorenzo's counterpetition for change of custody.

C. Best Interest of the Children

Finally, Deborah argues that the trial 'court order modifying custody' was not in the best interest of the children. Deborah argues that the trial court overlooked Lorenzo's character flaws and failed to consider that her own character flaws were attributable to Lorenzo's abusive behavior. She also argues that the trial court did not consider Lorenzo's influence on Christopher and Jonathan's testimony nor the testimony of her expert, Dr. Jaffe, who had opined that Deborah was not mentally ill. Essentially, Deborah argues that the trial court should have viewed the evidence differently. However, the trial court is in the best position to review the evidence and to weigh the credibility of the witnesses. *Bates*, 212 Ill. 2d at 515.

The trial court's determination that a change in custody was in the best interests of the children was not against the manifest weight of the evidence. In the present case, the trial court conducted a two-week trial, heard the testimony of approximately 13 witnesses, and considered multiple exhibits that were admitted into evidence. As explained above, in rendering its decision, the trial court considered all the statutory best interest factors set forth in section 602 of the Dissolution Act (750 ILCS 5/602(a) (West 2006), and noted its findings as to each factor. The trial court is not required to give equal weight to each factor and may afford more weight to certain factors based on the particular circumstances of the case. See *Alexander O.*, 336 Ill. App. 3d at 334. The trial court found it significant that both children said that they preferred to remain in the custody of their father. Despite Deborah's contention that their state-

ments were influenced by Lorenzo, the trial court found the boys' statements open, honest, and unequivocal. The trial court noted that both were mature and had sound reasoning and a good basis for their desire to remain with their father.

The trial court also found significant Klaung's opinion that the boys would be at risk physically and emotionally if custody were returned to Deborah. Specifically, Klaung testified that his concerns included Christopher feigning illness and Jonathan becoming enraged, acting out, and ending up in the criminal justice system. Deborah argues that the trial court erred in relying on Klaung's testimony because Klaung was unqualified to diagnose mental illness. We agree that because Klaung was not a psychiatrist, he was not qualified to render a medical diagnosis. See *People v. Caffey*, 205 Ill. 2d 52, 125-26 (2001). Nonetheless, Klaung's testimony was relevant to the boys' mental health, as based on his own observations of them.

The trial court further noted that the testimony of Dr. Jaffe and Dr. Rossiter differed as to whether Deborah suffered from Munchausen's or Munchausen's Syndrome-by-Proxy. As such, despite Deborah's contention to the contrary, the trial court did consider Dr. Jaffe's testimony and found it credible. Nonetheless, the trial court found much more significant the fact that Christopher's doctor and hospital visits decreased dramatically since emergency custody had been granted to Lorenzo. The trial court also found it important that on multiple occasions, when Deborah did not agree with a doctor's diagnosis as to a medical condition of Christopher, she would seek out and consult other doctors in an attempt to find a doctor that would agree with her. Finally, in

considering the best interests of the parties' children, the trial court found it significant that the evidence showed that while Deborah had custody of the boys, she frustrated Lorenzo's right to visitation and attempted to alienate him from the boys. As the trial court considered all the statutory best interest factors, and the evidence supports the trial court's conclusions, we cannot say that the trial court's determination was against the manifest weight of the evidence. See *Bates*, 212 Ill. 2d at 515.

VI. Visitation

Deborah's sixth contention on appeal is that the trial court erred in denying her visitation. At the outset, we note that Deborah argues that because Klaung testified as to medical diagnoses, his testimony was improper and should not have been considered by the trial court. As noted above, Klaung, as a licensed clinical social worker, was not qualified to testify as to medical diagnoses. See *People v. Caffey*, 205 Ill. 2d 52, 125-26 (2001). Nonetheless, this does not render all his testimony inadmissible. When Klaung testified as to his medical diagnoses of Deborah, her parents, and the boys, Deborah did not object. At trial, Deborah only objected as to Klaung being qualified as an expert, but not to his specific testimony as to medical diagnoses. Objections not raised at trial may not be considered for the first time on appeal. *People v. Parcel of Property Commonly Known as 1945 North 31st Street*, 217 Ill. 2d 481, 503 (2005). Moreover, in a bench trial, the trial court is presumed to consider only admissible evidence. *1945 North 31st Street*, 217 III. 2d at 504. Klaung's testimony was admissible and relevant as to the boys' mental health, based on his observations of them during their treatment. As such, it was not error for

the trial court to consider the relevant and admissible portions of Klaung's testimony.

Turning to the merits, a reviewing court will not interfere with the trial court's determination as to visitation in the absence of an abuse of discretion, or unless manifest injustice has been done to the child or parent. *In re Marriage of Slayton*, 292 Ill. App. 3d 379, 387 (1997). Section 607(a) of the Dissolution Act states that a parent not granted custody of a child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would seriously endanger the child's physical, mental, moral or emotional health. 750 ILCS 5/607(a) (West 2006). The endangerment standard embodied in section 607 has been described as onerous, stringent, and rigorous. *Slayton*, 292 Ill. App. 3d at 386. "The courts of this State have been reluctant to deny visitation rights because of the principle that parents have a natural or inherent right of access to their children, and because sound public policy encourages the maintenance of strong family relationships, even in post-divorce situations; only extreme circumstances allow courts to deprive. a parent of visitation." *In re Marriage of L.R*, 202 Ill. App. 3d 69, 85 (1990). Liberal visitation is the rule and restricted visitation is the exception. *In re Marriage of Diehl*, 221 Ill. App. 3d 410, 429 (1991). The custodial parent bears the burden of proving by a preponderance of the evidence that visitation with the noncustodial parent would seriously endanger the child. *Slayton*, 292 Ill. App. 3d at 387.

In the present case, Lorenzo has failed to meet this onerous burden. Because Christopher has attained majority, the visitation issue is now only relevant to Jonathan. See *Casarotto*, 316 Ill. App. 3d at 571.

Although Jonathan informed the trial court that he did not want any visitation with his mother, the preference of the child is only one of the many factors to be considered by the trial court in determining visitation. *Frail v. Frail*, 54 Ill. App. 3d 1013, 1016 (1977). We acknowledge that Klaung opined that visitation would impair the boys' treatment and that no person could adequately supervise visitation. With respect to Jonathan, Klaung believed that visitation would anger Jonathan since he had expressed that he had no desire to see his mother. However, the possibility that visitation would make Jonathan angry does not surpass the threshold of the serious endangerment standard. Moreover, the court appointed evaluator, Dr. Rossiter, recommended supervised visitation, despite his opinion regarding Deborah's mental condition. Additionally, Dr. Jaffee testified that Deborah had no mental illnesses and that she had a good ability to parent based on the score of her ASPECT test.

There is a strong public policy in this State in favor of preserving the relationship of parent and child and disfavoring a denial of all visitation rights. *Frail*, 54 Ill. App. 3d at 1015. This policy holds even when a parent may suffer from a mental illness or other disability. See *Frail*, 54 ill. App. 3d at 1015 (the court preserved the visitation rights of a mother confined in a penitentiary for murdering her husband); see also *McClelland v. McClelland*, 231 111. App. 3d 214, 226 (1992) (affirming trial court decision allowing mother regular visitation despite her mental illnesses and delusions); *In re Marriage of Neat*, 101 Ill. App. 3d 1046, 1049 (1981) (visitation granted to mother despite previous hospitalization for psychiatric treatment). Accordingly, we hold that the trial court abused its discretion in denying Deborah any visita-

tion. We vacate the trial court's judgment as to visitation and remand for the trial court to consider all the necessary criteria and to fashion an appropriate visitation schedule as to Jonathan.

VII. Motion for Voluntary Dismissal

Deborah's seventh contention on appeal is that the trial court erred in denying her motion for voluntary dismissal. On November 17, 1993, Deborah filed a petition for dissolution of marriage in Winnebago County. On September 17, 1997, Deborah filed a motion to voluntarily dismiss her petition. On November 24, 1997, the trial court denied that motion and the dissolution proceedings continued in Winnebago County. The trial court entered the final judgment for dissolution of marriage on September 18, 2001.

A final judgment in a civil case is entered where the last order closes the case and leaves no issues to be decided. *Argonaut-Midwest Insurance Co. v. E.W. Corrigan Construction Co.*, 338 III. App, 3d 423, 426 (2003). Once a final order is entered, all prior nonfinal orders and rulings become appealable. *Argonaut-Midwest*, 338 Ill. App. 3d at 427 Supreme Court Rule 303(a)(1) (155 Ill. 2d R. 303(a)(1)) requires that a notice of appeal be filed within 30 days of the entry of the final judgment, or, if a timely posttrial motion directed against the judgment has been filed, within 30 days after the entry of the order disposing of that motion. The failure to timely file a notice of appeal deprives this court of jurisdiction. See 15.5 Ill. 2d R. 301; *Lowenthal v. McDonald*, 367 Ill. App. 3d 919, 925 (2006).

In the present case, the September 18, 2001, order was the final order in the dissolution proceedings. At

that time, all prior nonfinal orders in the dissolution proceedings, such as the November 24, 1997, order denying Deborah's motion to voluntarily dismiss, became appealable. See *Argonaut-Midwest*, 338 DI App. 3d at 427. Because Deborah did not file a motion to reconsider, a notice of appeal as to the November 24, 1997, order had to be filed by October 18, 2001. The record reveals that Deborah did file a timely notice of appeal, but we later granted her motion to dismiss that appeal. The present notice of appeal filed July 31, 2007, is untimely as to the November 24, 1997 order. Accordingly, we lack jurisdiction to consider whether the trial court erred in denying Deborah's motion to voluntarily dismiss. See 155 Ill. 2d R. 301; *Lowenthal*, 367 Ill. App. 3d at 925.

VIII. Motions to Transfer Venue

Deborah's eighth and final contention on appeal is that the trial court erred in denying her motions to transfer venue to Cook County. Deborah filed three such motions, one on November 25, 1997, one on November 25, 2003, and one on January 11, 2007.

A. November 25, 1997, Motion to Transfer Venue

Deborah abandoned her November 25, 1997, motion to transfer venue to Cook County. It is the responsibility of the party filing a motion to request the trial court to rule on the motion, and when no ruling has been made on a motion, it is presumed to have been abandoned absent circumstances, indicating otherwise. *Commerce Trust Co. v. Air 1st Aviation Companies, Inc.*, 366 Ill. App. 3d 135, 142 (2006). After Deborah filed her November 25, 1997, motion to transfer venue, proceedings in the dissolution case progressed and a final judgment was entered on September 18, 2001. That judgment was final as to all the

predissolution proceedings. The trial court never ruled on the motion to transfer venue prior to entering the final judgment and the record does not show that Deborah ever requested the trial court to rule on it prior to entering the final dissolution judgment. Because Deborah never obtained a ruling on her November 25, 1997, predissolution motion to transfer venue, she waived that objection and failed to preserve the issue for appeal. See *Commerce Trust*, 366 Ill. App. 3d at 142.

B. November 25, 2003, Motion to Transfer Venue

Deborah's November 25, 2003, motion to transfer venue was based on section 512(b) of the Dissolution Act. Pursuant to that section, "the court may in its discretion, transfer matters involving a change in child custody to the judicial circuit where the minor or dependant child resides." 750 ILCS 5/512(b) West (2002). Deborah argues that the trial court abused its discretion in denying this motion to transfer venue. Deborah, as the appellant, bears the burden of providing a sufficiently complete record to support her claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with the law and had a sufficient factual basis. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Foutch*, 99 Ill. 2d at 392.

In the present case, the trial court ruled on the November 25, 2003, motion to transfer venue following a hearing on December 11, 2003. The trial court's December 11, 2003, order denying Deborah's motion to transfer venue does not indicate the basis for its determination. We acknowledge that Deborah has

provided an affidavit from the court reporter, LuAnn Fry, present at the December 11, 2003 hearing, indicating that she did not record any of the proceedings on that date and thus could not provide a transcript of proceedings. Nonetheless, Deborah could have filed a bystander's report or an agreed statement of facts as authorized by Supreme Court Rule 323 (166 Ill. 2d R. 323). Based on the record before us, we do not know what evidence or arguments were presented at the hearing on the motion to transfer venue, nor are we informed of the trial court's reasoning in denying the motion. Accordingly, we cannot review the claimed error to determine whether the trial court abused its discretion. See *Corral v. Mervis Industries, Inc*, 217. Ill. 2d 144, 157 (2005). In the absence of an adequate record preserving the claimed error, we must presume the trial court had a sufficient factual basis for its holding and that its order conforms with the law. *Corral*, 217 Ill. 2d at 157.

C. January 11, 2007; Motion to Transfer Venue

On January 11, 2007, Deborah filed another motion to transfer venue, pursuant to section 2--1001.5 of the Code (735 ILCS 5/2-1001:5 (West 2006)), on the basis that she would not receive a fair and impartial trial under the presiding trial court judge in Winnebago County. Section 2-1001.5 of the Code provides, in relevant part, that:

> "(a) A change of venue in any civil action may be had when the court determines that any party may not receive a fair trial in the court in which the action is pending because the inhabitants of the county are prejudiced against the party, or his or her attorney, or the adverse party has an undue influence over the minds of the 'inhabitants." 735 ILCS 5/2—1001.5 (West 2006).

A motion to transfer from one proper venue to another based On potential prejudice requires the trial court to exercise discretion and merits application of the abuse of discretion standard of review. *Corral*, 217 Ill. 2d at 151.

In her motion to transfer venue Deborah argued that she feared she would not receive a fair and timely trial before Judge Truitt because in a court proceeding held on January 4, 2007, Judge Truitt made comments indicating that he was not sure who to appoint as the child representative and that he did not think most child representatives would want to touch this case with a 10-foot pole. Judge Truitt also stated that his docket was full and that it would be difficult to make time to hear this case. Deborah also argued that she would not be able to receive a timely trial in Winnebago. County and noted that she had filed multiple petitions that had not been ruled upon. Finally, Deborah argued that Judge Nordquist's June 15, 2005, orders showed a bias and prejudice against her. For all these reasons, she requested a change of venue to Cook County.

In her appellant's brief, Deborah, relying on *Joseph v. Joseph*, 15 Ill. App. 3d 714, 718 (1973), argues that the right to a change of venue on account of the prejudice of a trial court is absolute as long as statutory requirements are met: However, in 1993 the legislature amended section 2--1001 of the Code and added section 2--1001.5 to distinguish between "substitution of judge" and a "change of venue." Public Act 87--949, § 1, eff. January 1, 1993; *In re Estate of Hoeller*, 367 Ill. App. 3d 240, 246 (2006). Case law published prior to January 1993 uses the terms "substitution of judge" and "change of venue" interchangeably. *Hoeller*, 367 Ill. App. 3d at 246. Under

the present version of section 2--1001.5 of the Code, however, a change of venue is only allowed on the basis of potential prejudice of the forum county's jury pool. See 735 ILCS 5/2-1001.5(a) (West 2006).

In this case, Deborah's motion was based on the potential prejudice of the trial court judge. Any such prejudice would have entitled Deborah to file a motion for substitution of judge pursuant to section 2--1001 of the Code (735 ILCS 5/2-1001 (West 2006)). We cannot say that the trial court erred in not treating her motion as a motion for substitution of judge pursuant to that section of the statute. Deborah's motion made it clear that the ultimate relief she was seeking was a change of venue to Cook County, not merely a substitution of judge. However, as noted, section 2-1001.5 does not warrant a change of venue to another county on the basis of the potential prejudice of a trial court judge.

Moreover, as a practical matter, we cannot say that the trial court abused its discretion. On January 29, 2007, at the hearing on the motion, the trial court addressed Deborah's concerns. Judge Truitt explained that Winnebago County would be providing him the necessary coverage on his calls so that he would have time to hear this case. He also appointed a child representative. Finally, Judge Truitt assured Deborah that she would receive a fair and timely trial. Although Deborah argued that Judge Nordquist was biased against her, he was no longer on the case and, therefore, this concern was no longer valid. Because the trial court addressed Deborah's concerns, we cannot say it abused its discretion in denying the motion to change venue.

CONCLUSION

For the foregoing reasons, the judgment of the circuit court of Winnebago County is affirmed in part and reversed in part, and remanded for additional proceedings consistent with this order.

Affirmed in part and reversed in part; cause remanded.

Gilleran Johnson, J., with Byrne, P.J., and Callum, J., concurring.

APPENDIX D

THIS APPEAL INVOLVES A QUESTION OF CHILD CUSTODY, ADOPTION, TERMINATION OF PARENTAL RIGHTS OR OTHER MATTER AFFECTING THE BEST INTERESTS OF A CHILD

IN THE APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

[Filed Jan. 28, 2008]

IN RE: THE MARRIAGE OF
DEBORAH ORLANDO COONEY, f/k/a ORLANDO,
Petitioner-Appellant,

v.

LORENZO ORLANDO,
Respondent-Appellee.

On Appeal from the Circuit Court of
Winnebago County, Illinois
Domestic Relations Division, 93 D 1332
The Honorable John R. Truitt, Judge Presiding

Judgment entered June 20, 2007
Order Denying Post-Trial Motion entered
July 26, 2007
Notice of Appeal filed July 31, 2007
Appellate Court Rule 23 Order filed January 7, 2008

PETITIONER-APPELLANT'S PETITION
FOR REHEARING

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PETITIONER-APPELLANT'S PETITION FOR REHEARING

ISSUES PRESENTED FOR REHEARING

This Petition for Rehearing is brought pursuant to Illinois Supreme Court Rule 367. Petitioner-Appellant Deborah Orlando Cooney ("Deborah") raises two points in her Petition:

1. In the Rule 23 Order, this Court's rigid application of the 5-business day deadline for the filing of a petition for leave to appeal under Rule 306(b)(1) was unconstitutional as applied to Deborah. This constitutional issue arises for the first time in and as a result of the action of this Court in making this ruling.

2. In the Rule 23 Order, this Court overlooked and misapprehended certain evidence that renders the underlying judgment granting Respondent-Appellee Lorenzo Orlando's ("Lorenzo") Counter-Petition for Change of Custody against the manifest weight of the evidence.

ARGUMENT

I. THIS COURT'S RIGID APPLICATION OF THE DEADLINE TO FILE A PETITION FOR LEAVE TO APPEAL UNDER RULE 306(b)(1) WAS UNCONSTITUTIONAL AS APPLIED TO DEBORAH.

In the Rule 23 Order, this Court declined to reach the merits of Deborah's argument that the circuit court erred in entering an emergency order modifying custody and transferring custody of the children to Lorenzo on June 15, 2005, without the requisite findings to support such an order, without providing Deborah the investigator's report 10 days prior to the "hearing," and without providing Deborah a hearing on custody. (See, argument in Section III in the Brief of Petitioner-Appellant, pp. 20-23, and Rule 23 Order, pp. 24-26).

This Court's rigid application of the five (5) business day deadline for the filing of a petition for leave to appeal under Rule 306(b)(1) was unconstitutional as applied to Deborah. This constitutional

issue arises for the first time in and as a result of the action of this Court in making this ruling.

By the overly rigid interpretation of Supreme Court Rule 306(b), this Court is attempting to justify its overlooking and cursory dismissal of the heart of Deborah's argument that the patent violation of her due process rights on June 15, 2005 tainted the outcome of the final custody proceeding in 2007. This Court stated: "We need not reach the merits of this argument." (Rule 23 Order, p. 25).

This Court rested that conclusion on the fact that Rule 306(b)(1) required that a petition for leave to appeal an order affecting the care and custody of unemancipated minors must be filed within five business days of the entry of the order. As a result of the Rule 23 Order, this Court has created an issue that was not even raised or briefed on this appeal (until now).

A. Deborah has a Fundamental Liberty Right in the Care and Custody of Her Children.

Courts in the United States have long recognized parents' fundamental right to the care, custody and control of their children: "The liberty interest...of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). The right to conceive and to raise children has been deemed "essential." *Stanley v. Illinois*, 405 U.S. 645, 651 (1972), *citing Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), and has been deemed a "basic civil right of man." *Stanley*, 405 U.S. at 651, citing *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

The rights to conceive and raise children have been considered "(r)ights far more precious . . . than property rights." *Stanley*, 405 U.S. at 651, *citing May v. Anderson*, 345 U.S. 528, 533 (1953). "The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment (*Meyer*, 262 U.S. at 399), the Equal Protection Clause of the Fourteenth Amendment, (*Skinner* 316 U.S. at 541), and the Ninth Amendment (*Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring))." *Stanley*, 405 U.S. at 651.

In this case, Deborah's liberty interests with respect to her care, treatment and custody of Christopher and Jonathan are fundamental liberty rights that are afforded constitutional due process protections.

B. Illinois Supreme Court Rule 306(b)(1) Is Unconstitutional "As Applied" to Deborah, As It Interfered With Her Fundamental Liberty Right in the Care and Custody of Her Children.

An "as applied" constitutional challenge requires a plaintiff to show the statute violates the constitution as it applies to her. *Russell v. Blagojevich*, 367 Ill.App.3d 530, 534 (4th Dist. 2006), citing, *People v. Garvin*, 219 Ill.2d 104, 117 (2006). A party raising an "as-applied" challenge need only show that, although the law may be constitutionally applied in most circumstances, it was specifically applied to her in an unconstitutional manner. *Garvin*, 219 Ill.2d at 117. Furthermore, an "as-applied" challenge represents a plaintiff's protest against how a statute was applied in the particular context in which the plaintiff acted or proposed to act. *Lamar Whiteco Outdoor Corp. v.*

City of West Chicago, 355 Ill.App.3d 352, 365 (2nd Dist. 2005).

An analogous case is *Lulay v. Lulay*, 193 Ill.2d 455 (2000), in which the Illinois Supreme Court found section 607(b)(1) of the Illinois Marriage and Dissolution of Marriage Act ("Act") unconstitutional as applied to the facts of that case. In *Lulay*, the parents were divorced and had joint custody of their three minor children. 193 Ill.2d at 457. The paternal grandmother filed a petition pursuant to section 607(b)(1) of the Act, seeking visitation with her three grandchildren. *Id.* Both parents agreed that they did not want the paternal grandmother to have visitation, and they filed a motion to dismiss the petition. *Id.*, at 458.

The Supreme Court agreed with the parents that section 607(b)(1), as applied to the facts of the case, was an unconstitutional infringement on the parents' fundamental liberty interest in raising their children. *Id.*, at 479-80. The *Lulay* Court stated:

> [W]e cannot allow the state to use its power to impose its judgment that visitation may be better for the grandchildren over the joint decision of two fit parents who have determined that the visitation should not occur. The facts of this case do not warrant the state's interference with the parents' joint decision regarding who may have visitation privileges with their children. To allow such interference would unconstitutionally infringe on the parents' well-established fundamental liberty interest in making decisions regarding the upbringing of their children. 193 Ill.2d at 479.

Turning to this case, in looking at the specific facts, Rule 306(b) is unconstitutional as applied to Deborah,

as it infringed on her fundamental liberty interest in the care and custody of her children.

On June 15, 2005, the trial court granted Lorenzo's emergency petition for a temporary change of custody. (Vol. 2 of 3, R.0000467, R0000481). Pursuant to Supreme Court Rule 306(a)(5), Deborah was permitted to file a petition for leave to appeal the temporary change of custody. *See*, S.Ct. Rule 306(a)(5). The timing in which to file her petition was governed by Supreme Court Rule 306(b)(1) which provides, in relevant part: "The petition, supporting record and the petitioner's legal memorandum, if any, shall be filed in. the appellate court within five business days of the entry or denial of the order from which review is being sought. . ." S.Ct. Rule 306(b)(1). Thus, pursuant to Rule 306(b)(1), Deborah's petition for leave to appeal was to be filed in the appellate court on or before, June 22, 2005. However, Deborah's counsel, Mr. Alex Abate, failed to timely perfect the appeal.

Instead, on June 22, 2005—the day the petition for leave to appeal was due—Mr. Abate served Deborah with his Motion to Withdraw as Deborah's counsel. (Vol. 3 of 3, RC000507-08). One week after the appeal deadline—on June 29, 2005—Mr. Abate filed his Motion to Withdraw. (Vol. 3 of 3, R.0000507). On that very same day, the trial court granted Mr. Abate's Motion to Withdraw. (Vol. 3 of 3, R.0000509).

In granting Lorenzo's emergency petition for a temporary change in custody, the circuit court clearly erred in taking Deborah's children away without any notice, hearing or findings whatsoever. Even this Court noted that no testimony or evidence was taken at the June 15, 2005 "hearing." (Rule 23 Order, p. 8). Fundamental fairness dictates the reinstatement of

Deborah's right to appeal the order, as such a rigid application of Rule 306(b)(1) is unconstitutional as applied to Deborah under these circumstances.

C. Other Jurisdictions Have Created A "Fundamental Fairness" Exception To A Litigant's Failure to Timely Perfect An Appeal.

Other jurisdictions have created a "fundamental fairness" exception to a litigant's failure to timely effect an appeal. For instance, in *State v. Ortiz*, the Supreme Court of Kansas, in the interest of fundamental fairness, recognized an exception to the rule (conferring jurisdiction on the appellate court only if a timely appeal is perfected) where a criminal defendant either was not informed of his right to appeal, or whose attorney failed to perfect and complete an appeal. 230 Kan. 733, 736 (Kan. 1982).

Years later, the court in *In re T.M.C.* extended the fundamental fairness exception as explained in *Ortiz* to civil proceedings—**specifically to civil proceedings involving the termination of parental rights**. 26 Kan.App.2d 297, 299 (Kan.App. 1999). The *T.M.C.* court stated:

> Termination of parental rights proceedings affect important substantive due process rights. It is well-settled that basic parental rights are fundamental rights protected by the Fourteenth Amendment to the Constitution of the United States and cannot be abrogated except for compelling reasons. 26 Kan.App.2d at 299.

The *T.M.C.* court held "**we conclude it is proper to apply the fundamental fairness exception to an untimely appeal from a termination order.**" *Id.*, at 299 (emphasis added).

Similarly, in the case at hand, Deborah was not informed of her right to appeal, and her attorney failed to perfect and complete an appeal. This Court should apply the fundamental fairness doctrine, and allow Deborah to appeal the termination of her fundamental, constitutional parental rights.

In *State v. Johnson*, the Supreme Court of Utah held that an attorney's failure to perfect an appeal was grounds for allowing the appellate court to take jurisdiction over what would otherwise have been an untimely appeal. 635 P.2d 36, 38 (Utah 1981). Thereafter, in *Manning v. State*, the Utah Supreme Court set forth circumstances in which the court could reinstate the time frame for filing an appeal. 122 P.3d 628, 636 (Utah 2005). One such circumstance is where "the court or the defendant's attorney failed to properly advise defendant of the right to appeal." *Id.*, at 636. The *Manning* court concluded that "**the right to appeal may then be restored if it is in the interest of fundamental fairness to do so.**" *Id.*, at 639 (emphasis added). Likewise, in the case at hand, Deborah was not advised by her attorney of the 5-day deadline in which to file an appeal, and fundamental fairness dictates the reinstatement of Deborah's right to appeal the circuit court's erroneous deprivation of her liberty right to care for her children.

In *Esters v. State*, the Alabama Appellate Court held that under the Rules of Professional Conduct a withdrawing attorney must take steps to protect the client's interests, and the attorney's failure to timely file an appeal was grounds for allowing the appellate court to take jurisdiction over the appeal. 894 So.2d 755, 762 (Ala.Crim.App. 2003). This is similar to the case at hand, where Deborah's attorney served her with his motion to withdraw on the same day that

her interlocutory appeal was due to be filed, but he failed to perfect her appeal prior to his withdrawal.

In *Bryant v. State*, the Supreme Court of Arkansas set forth two grounds for allowing the filing of an untimely appeal, as follows:

> Where an appeal is not timely perfected, either the party or attorney filing the appeal is at fault, or there is good reason that the appeal was not timely perfected. The party or attorney filing the appeal is therefore faced with two options. First, where the party or attorney filing the appeal is at fault, fault should be admitted by affidavit filed with the motion or in the motion itself. There is no advantage in declining to admit fault where fault exists. Second, where the party or attorney believes that there is good reason the appeal was not perfected, the case for good reason can be made in the motion, and this court will decide whether good reason is present. 362 Ark. 167, 168 (Ark. 2005).

In *Bryant*, the attorney filed a motion in which he "candidly admitted fault," and therefore the court allowed the untimely appeal. *Id.*, at 168. Likewise, this Court should allow Deborah the opportunity to have her former attorney file an affidavit or motion admitting fault for his failure to timely file an appeal within the 5-day deadline. Deborah's constitutional, parental rights should not be forfeited due solely to her attorney's fault in failing to timely perfect an appeal.

D. Illinois Courts Have Made Exceptions to the Rigid Adherence to Deadlines, Especially Deadlines Imposed by Supreme Court Rules.

It is well-settled that the Illinois Supreme Court has the power to make and interpret its own rules.

Swain v. Hoberg, 380 Ill. 442, 445 (1942); see also, 735 ILLS 5/1-104 ("The Supreme Court of this State has power to make rules of pleading, practice and procedure for the circuit, Appellate and Supreme Courts. . .").

Illinois Courts have recognized fundamental fairness exceptions to the rigid adherence to deadlines.

Recently the Illinois Supreme Court in *Vision Point of Sale, Inc. v. Haas* has relaxed the previously rigid approach for a party's delinquency in complying with requests to admit facts, under S.Ct. Rule 216. 226 Ill.2d 334 (2007). Prior to *Vision Point*, a harsh and inflexible standard developed in which "mistake, inadvertence, or attorney neglect" could never serve as a basis for establishing good cause to support an extension pursuant to Supreme Rule 183. *Id.*, 226 Ill.2d 339. The Supreme Court reversed this "harsh" standard stating that the trial court could consider all the "objective and relevant evidence" presented by the delinquent party.

Specifically, the *Vision Point* Court held:

> The circuit court has the sound discretion to consider all objective, relevant evidence presented by the delinquent party with respect to why there is good cause for its failure to comply with the original deadline and why an extension of time should now be granted. The circuit court may receive evidence with respect to whether the party's original delinquency was caused by mistake, inadvertence, or attorney neglect. . . . 226 Ill.2d at 353.

In this instance, following *Vision Point,* this Court should look to all objective relevant evidence as to why Deborah failed to perfect her appeal within the

five (5) business day deadline proscribed by Rule 306(b)(1). Of significance, Deborah's attorney, Mr. Abate, withdrew leaving her without the benefit of counsel during a crucial time. Without the benefit of an attorney, Deborah had no knowledge of the 5-day deadline, and she was unable to file her petition for leave to appeal the custody order. A rigid application of Rule 306(b)(1) jeopardizes Deborah's fundamental liberty right to the custody of her children.

In this case, Deborah would be deprived of a constitutional liberty right to the care and custody of her children, through no fault of her own, where the circuit court patently failed to follow any of the statutory requirements for the entry of the order, and where Deborah's withdrawing attorney failed to timely perfect an appeal of that erroneous order. It is unlikely that the Illinois Supreme Court meant for such a harsh result to occur by a rigid application to one of its procedural Rules. This Court should interpret Rule 306(b) to allow for an untimely appeal in circumstances, such as these, where fundamental fairness dictates a discretionary exception to the Rule.

The Illinois Appellate Court has the power to allow a late notice of appeal in criminal cases. *People v. Golden,* 369 Ill.App.3d 639, 645 (2nd Dist. 2006). A late notice of appeal may be filed in a criminal case in Illinois "to promote the concept of fundamental fairness." *People v. Perez*, 115 Ill. App.3d 446, 451 (1st Dist. 1983). Just as the Kansas Supreme Court did in *In re T.M.C.*, this Court should also extend the fundamental fairness exception to civil proceedings involving the termination of constitutionally protected parental rights. The right to a criminal appeal and the right to the care and custody of children are both constitutionally protected rights. The public

policy behind a fundamental fairness exception to allowing a late appeal in both cases is the same, as they both involve the deprivation of constitutional rights. There is no sound policy reason why a late appeal is allowed to preserve a criminal defendant's constitutional rights, but is not allowed in a civil case involving the termination of constitutionally protected parental rights.

Finally, *this Court* established an exception to the 150-day deadline in which this Court had to issue its decision in this case. S.Ct. Rule 306A(f)--which is applicable to the instant case--provides: "Except for good cause shown, the appellate court shall issue its decision ion within 150 days after the filing of the notice of appeal." The notice of appeal was filed in this case on July 31, 2007, but this Court did not issue its decision in this case until 160 days later (on January 7, 2008). This Court did not rigidly apply the 150-day deadline for its decision, and this Court should not rigidly apply the 5-day deadline for Deborah to have appealed the circuit court's gross abuse and clear violation of her constitutional right to the care and custody of her children.

II THIS COURT OVERLOOKED AND MISAPPREHENDED CERTAIN EVIDENCE THAT RENDERS THE UNDERLYING JUDGMENT GRANTING A CHANGE OF CUSTODY AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

In the Rule 23 Order, this Court held that the circuit court did not abuse its discretion in modifying custody and awarding custody of the children to Lorenzo. (See, argument in Section V in the Brief of Petitioner-Appellant, pp. 26-32, and Rule 23 Order, pp. 26-36).

This Court overlooked and misapprehended certain evidence that renders the underlying judgment granting Lorenzo's Counter-Petition for Change of Custody against the manifest weight of the evidence.

In its recitation of the "Background" of the case, this Court seemingly overlooked portions of Dr. Rossiter's report averred to in Deborah's Statement of Facts (SOF), namely, the negative aspects with respect to Lorenzo. For instance, the parties separated in 1993 when Deborah discovered that Lorenzo was having an affair with a young woman (SOF p. 3); that Lorenzo admitted to seriously neglecting Deborah and the boys during the years they lived together (SOF, p. 4); over the years, Lorenzo went from one serious relationship to another with three different named women (SOF, p. 4).

This Court overlooked the fact that Deborah was the primary caretaker of the children from their birth until Judge Nordquist took them away from her (SOF, p. 4), that there was a "legislative presumption" in favor of the custodial parent (*In re Marriage of Eldert*, 158 Ill. App. 3d 798, 805 (3rd Dist. 1987)) (Reply Brief, p. 8), or that the court-appointed evaluator, Dr. Dudgeon, recommended that Deborah should be given sole custody of the boys in 1996 (SOF, p. 5).

Much is made of the circuit court's interview with Christopher in 2007, painting a negative picture of his mother, but this Court overlooked the fact that said interview occurred after two years of no contact with his mother and that in 2004, in another court interview, Christopher had nothing but good things to say about Deborah (SOF, p. 7).

With respect to the testimony of Brian Klaung, this Court overlooked the fact that Klaung, based on one

meeting with the boys and one meeting with the parents, and without having read Dr. Rossiter's report, came to the conclusion that Deborah should have no contact with her children (SOF, p. 10). Further, during the entire two years of his involvement with the case, Klaung never contacted or attempted to interview Deborah because "she was not my client." (SOF, p. 10). This Court overlooked the fact that Klaung misinterpreted Dr. Rossiter's report regarding visitation, that he never spoke with Dr. Rossiter, or Christopher's treating physician or treating psychiatrist, that he had only taken one course on parental alienation syndrome and no courses on Munchausen's, and that he thought that the parenting skills test, ASPECT, was a pain tolerance test (SOF, p. 11).

This Court stated that it could not consider Deborah's objection (in this appeal) to the trial court's considering Klaung's proffered medical diagnoses because "Deborah did not object [at trial]." This misapprehends the thrust of Deborah's argument that the opinion testimony was admitted over the repeated objections of Deborah's attorney (Appellant's Brief, p. 39). Any further objection would have been "futile." *In re Marriage of Gordon*, 233 Ill.App.3d 617, 650 (1st Dist 1992), app. den. 147 Ill. 2d 626 (1992)

With respect to Dr. Rossiter, this Court overlooked the fact that he admitted that he had only dealt with one or two Munchausen's cases (SOF, p. 11), or that he never really explained why he did not have the testing performed that he was authorized to do, that he thought the MMPI-II was a test of 350 or maybe 250 questions and a person could be coached to achieve better results on it, that he had only a general idea about the ASPECT test, that he spent no time with Deborah's father and only "some period of time" with

Deborah's mother but concluded that all three had delusional beliefs, and that he never spoke with Christopher's treating internist, Dr. Hussain, or Christopher's treating psychiatrist, Dr. Goslawski (SOF, p. 12-13).

By the same token, this Court seems to overlook Dr. Jaffee's testimony that the MMPI-II was most reliable psychological test, with 567 questions, never with as few as 350, that a person could not be coached as to its results, that Deborah's results on it did not indicate Munchausen's, and that he felt that Dr. Rossiter's conclusion that Deborah's parents suffered from delusional beliefs after a 30-minute conversation was "outrageous." (SOF, p. 12). This Court observed that Dr. Jaffee never interviewed Lorenzo, the children or Deborah's parents nor did he do a custody evaluation. However, this misapprehends apprehends the purpose of Dr. Jaffee's testimony. He was only evaluating Deborah and critiquing Dr. Rossiter's report and methodology no interviews were necessary.

Deborah submits that if this Court factors in some of the overlooked and misapprehended evidence and arguments, it must conclude that Deborah's evidence is so "strong and convincing" as to completely overcome the evidence and presumptions, if any, that exist in favor of Lorenzo. *Dizney v. Witt*, 26 Ill.App.3d 45, 49 (2nd Dist. 1975) In summary, "what occurred in this case cannot be approved." See, *In re Marriage of Gordon, supra*, at p. 665.

III. NO WAIVER OF OTHER ISSUES FOR FURTHER REVIEW.

S.Ct. Rule 367(b) states that "reargument of the case shall not be made in the petition." Accordingly,

Deborah reserves her right to seek further review of any previously-raised issues that are not raised in this petition.

Respectfully submitted,
Petitioner-Appellant DEBORAH ORLANDO COONEY,

By:/s/ Thomas A. Zimmerman, Jr.
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STATE OF ILLINOIS APPELLATE COURT
SECOND DISTRICT

Appeal from the Circuit Court of
County of Winnebago

Trial Court No.: 93D1332

THE COURT HAS THIS DAY, 02/08/08, ENTERED THE FOLLOWING ORDER IN THE CASE OF:

Gen. No.: 2-07-0758

IRMO: Orlando Cooney, Deborah & Orlando, Lorenzo

Upon consideration of the Petition for Rehearing filed by petitioner-appellant, the Petition for Rehearing is hereby denied.
(Gilleran Johnson, Byrne, Callum, JJ.)

Robert J. Mangan
Clerk

cc: Zimmerman Law Offices. P.C.
'Thomas A. Zimmerman, Jr.
Hugh J. Green
Sreenan & Cain, P.C.
Peter B. Nolte
Daniel J. Cain
Anne M. Vecchio

THIS APPEAL INVOLVES A QUESTION OF CHILD CUSTODY, ADOPTION, TERMINATION OF PARENTAL RIGHTS OR OTHER MATTER AFFECTING THE BEST INTERESTS OF A CHILD

IN THE SUPREME COURT OF ILLINOIS

[Filed Mar. 14, 2008]

No. 106234

IN RE: THE MARRIAGE OF
DEBORAH ORLANDO COONEY, f/k/a ORLANDO,
Petitioner-Appellant,

v.

LORENZO ORLANDO,
Respondent-Appellee.

On Appeal from the Circuit Court of Winnebago County, Illinois
Domestic Relations Division, 93 D 1332
The Honorable John R. Truitt, Judge Presiding

Judgment entered June 20, 2007
Order Denying Post-Trial Motion entered July 26, 2007
Notice of Appeal filed July 31, 2007
Appellate Court Rule 23 Order filed January 7, 2008
Petition for Rehearing filed January 28, 2008
Appellate Court Order Denying Petition for Rehearing entered February 8, 2008

PETITIONER-APPELLANT'S
PETITION FOR APPEAL AS A MATTER OF RIGHT

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ORAL ARGUMENT REQUESTED

IN THE SUPREME COURT OF ILLINOIS

[Filed Mar. 14, 2008]

IN RE: THE MARRIAGE OF
DEBORAH ORLANDO COONEY, f/k/a ORLANDO,
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Appellate Court Order Denying Petition for Rehearing entered February 8, 2008

PETITIONER-APPELLANT'S PETITION FOR APPEAL AS A MATTER OF RIGHT

PRAYER FOR LEAVE TO APPEAL

Petitioner-Appellant Deborah Orlando Cooney ("Deborah") brings this appeal as a matter of right,

pursuant to Illinois Supreme Court ("S.Ct.") Rule 317, as a question under the United States Constitution arises for the first time in and as a result of the action of the appellate court in its Rule 23 Order. Specifically, the appellate court's rigid application of S.Ct. Rule 306(b)(1) was unconstitutional as applied to Deborah under the facts of this case.

In the alternative, leave to appeal should be allowed as a matter of judicial discretion pursuant to S.Ct. Rule 315. The question presented in this appeal (i.e. the right to raise children) is of paramount importance and has been deemed an essential, basic civil right that is perhaps the oldest of the fundamental liberty interests. Additionally, there is a need for the exercise of this Court's authority to interpret one of its S.Ct. Rules.

PRIOR APPELLATE HISTORY

The Rule 23 Order of the appellate court was filed on January 7, 2008, affirming in part, reversing in part and remanding the cause. Petitioner-Appellant's Petition for Rehearing was denied on February 8, 2008.

POINTS RELIED UPON FOR REVIEW

This Petition for Appeal as a Matter of Right is brought pursuant to S.Ct. Rule 317, and, in the alternative, leave to appeal should be allowed as a matter of judicial discretion pursuant to S.Ct. Rule 315. Deborah raises two points in her Petition:

1. In the Rule 23 Order, the appellate court's rigid application of the 5-business day deadline for the filing of a petition for leave to appeal under S.Ct. Rule 306(b)(1) was unconstitutional as applied to Deborah, considering

the circumstances surrounding the entry of the June 15, 2005 trial court orders and their impact on the June 2007 custody hearings. This constitutional issue arises for the first time in and as a result of the action of the appellate court in making this ruling.

2. In the Rule 23 Order, the appellate court overlooked and misapprehended certain evidence that renders the underlying judgment granting Respondent Appellee Lorenzo Orlando's ("Lorenzo") Counter-Petition for Change of Custody against the manifest weight of the evidence.

STATEMENT OF F ACTS

Deborah and Lorenzo were married in Chicago in 1987. In 1989, Lorenzo's job required the parties to move to Rockford. Two children were born to the marriage: Christopher; born on September 22, 1989, and Jonathan, born on December 29, 1991. (App. A000068) On November 17, 1993, Deborah filed a petition for dissolution of marriage in Winnebago County. (Vol. 1 of 6, R. C000001) On June 15, 1998, the circuit court granted dissolution of marriage, respecting the bonds themselves, without addressing other issues such as custody, maintenance and property distribution. (Vol. 5 of 6, R. C000876) On September 18, 2001, the trial court entered an order resolving the remaining issues. This order also granted permanent custody of the children to Deborah and incorporated a previously accepted co-parenting agreement. (Vol. 6 of 6. R. C000978) On October 19, 2001, Deborah filed a petition to remove the children to Ohio where she and her new husband had built a home. (Vol. 6 of 6, R. C000983) On November 19, 2001, Lorenzo filed a response to the

petition for removal and a counter-petition for change of custody. (Vol. 6 of 6, R. C300987) On August 29, 2002, the trial court entered an order denying Deborah's petition to remove. (Vol. 1 of 3, R. C300029, C000037) Lorenzo's counter-petition for change of custody remained pending.

On October 17, 2002, Attorney Kathryn Bischoff was appointed by the trial court to act as the children's representative, pursuant to 750 ILLS 5/506(a)(3). (Vol. 1 of 3, R. C000052) Ms. Bischoff was present for the *in camera* interview with Christopher on July 9, 2004. In that interview, Christopher painted a very negative picture of his relationship with his father. (Tr. R000551, *et. seq.).* However, Christopher was interviewed again on June 5, 2007 with Ms. Janet Fuenty (the successor child's representative) present. After a passage of two years without having any contact with his mother and living with his father, and under the continued counseling of Brian Klaung (Vol. 5 of 5, R. c001012), Christopher then painted a very negative picture of his relationship with Deborah. (Tr. R002338, *et. seq.).*

On September 23, 2004, the trial court, pursuant to 750 ILLS 5/605, appointed Lyle Rossiter, M.D. to conduct an independent evaluation and make written recommendations concerning the custodial arrangements for the minor children. (Vol. 2 of 3, R. C000375) The court order specifically authorized Dr. Rossiter to conduct psychological testing of the parties and the children, and if Dr. Rossiter did not conduct any such testing the order provided that Dr. Rossiter was to state the reasons why no such testing was performed. (Vol. 2 of 3, R. C000376)

Dr. Rossiter submitted his 33-page written report to Ms. Bischoff on June 10, 2005. (App. A000066-98)

In that report, Dr. Rossiter made findings, conclusions, and recommendations. He had not performed any psychological testing on Christopher or Deborah, and he failed to state the reasons why he did not perform any such testing. However, he found that both suffered from delusional disorders and that the delusions were shared by Deborah's parents. (App. A000095) Although noting that Deborah and her parents had been the boys' primary caretakers since their births, he recommended that Christopher and Jonathon be placed in immediate temporary custody of Lorenzo and ultimately in his permanent custody. (App. A000096) He concluded in part that Deborah and her parents should immediately seek individual and family psychiatric evaluations for delusional disorder, Munchausen's-by-proxy syndrome and parental alienation syndrome. He recommended that visitation with Christopher by Deborah and her parents should initially be brief, closely supervised, and subject to Christopher's attending psychiatrist's recommendations. (App. A000097) His report did not disclose that he had met with Lorenzo's wife, Laurie, on two occasions before his appointment by the court (Tr. R003141)

On June 14, 2005, Dr. Rossiter's report was submitted to the circuit court and the attorneys for the parties through Ms. Bischoff. On that day, the circuit court issued a protective order that the lawyers were not to release a copy of or any information concerning Dr. Rossiter's report to their clients. (Vol. 2 of 3, R. C000463). As part of that same order, the circuit court compelled the parties and the children to appear in court on June 15, 2005, without any explanation for the mandate. (Vol. 2 of 3, R. 0300463).

On June 15, 2005, Lorenzo filed his Emergency Petition for an Order of Protection (Vol. 2 of 3, R. C000464) and his Emergency Petition for Change of Custody. (Vol. 2 of 3, R. C000478) Both Petitions were ostensibly based on Dr. Rossiter's report. In fact, the Emergency Petition for Change of Custody refers to the findings, conclusions and recommendations set forth in Dr. Rossiter's report. It was signed by Lorenzo and notarized on June 13, 2005—a day before the attorneys ostensibly received the report from Ms. Bischoff. (Vol. 2 of 3, R. C000478-479). On June 15, 2005, the parties were then provided copies of the report that they were to read while in court. Deborah's attorney objected on the basis of not receiving 10 days notice pursuant to Section 5/605 (Tr. R000648), and that Deborah was being denied her statutory right to cross-examine e the witness. (Tr. R000650).

The circuit court did not examine the Petitioner (Lorenzo) under oath or affirmation nor make the minimum required findings, as required by 750 ILCS 5/610(b). As the appellate court noted, no testimony or evidence was taken at that "hearing." (App. A000271) The circuit court simply referred to Dr. Rossiter's report in that it contained "very serious and disturbing conclusions and recommendations which I accept . . . I will grant an emergency order of protection . . . and will award [Lorenzo] temporary custody of the two children . . ." (Tr. R000654). When reminded that he had not addressed the Emergency Petition for a Change in Custody, the judge simply granted that Emergency Petition without further ado, including a provision that Deborah was to have no contact with her children until further order of court. (Tr. R000659; Vol. 2 of 3, R C000481) Suddenly, Deborah, who was the primary caregiver of

her children since their births, was now a non-custodial parent without any visitation rights. Both orders were continued to June 29, 2005. (Vol. 2 of 3, R. C000481-482). In the interim, on June 22, 2005, Deborah's attorney, Alex Abate, served her with his Motion to Withdraw, without having filed an appeal. (Vol. 3 of 3, R. C000507-508) On June 29, 2005, he filed that Motion which the trial court granted that same day. (Vol. 3 of 3, R. C000509)

Ultimately, on December 12, 2006, the circuit court dismissed Lorenzo's Petition for an Order of Protection and vacated the Emergency Order of Protection ("EOP"), which had been extended thirty (30) times in the interim. (Vol. 2 of 5, R C000393; App. A000286). However, on that day the circuit court simultaneously entered a "no contact" order barring Deborah from having any contact with her boys. (Vol. 2 of 5, R. C000394)

At the custody proceedings in June 2007, Lorenzo presented the testimony of Brian D. Klaung, LCSW ("Klaung"). (Tr. R002408). Over Deborah's objection, Klaung, a licensed clinical social worker, was allowed to testify and render opinions as an expert. (Tr. R002408, R002427) Ultimately, the court ruled that "[t]he [c]ourt is going to find him qualified as an expert in those areas in which he testified to." (Tr. R002554)

Klaung had been hired by Lorenzo on June 23, 2005 to provide counseling to Christopher and Jonathan, shortly after the circuit court's June 15, 2005 emergency orders. (Tr. R002430). On June 23, 2005, he spoke with Lorenzo and his wife, Laurie, who provided Klaung with a copy of Dr. Rossiter's report, as well copies of the divorce decree and the EOP, and their chronology of medical treatment and

various incidents that occurred from 1993 to the present. (Tr. R002435). On June 27, 2005, Klaung met with the boys. Based on those two meetings, and without yet having read Dr. Rossiter's report, he came to the conclusion that Deborah should have no contact with her children (Tr. R002480-2481). During the entire two years of his involvement with this case, Klaung has never contacted or attempted to interview Deborah, because "she was not my client." (Tr. R002534).

Klaung testified that he was "convinced with a complete degree of certainty" that the "parental alienation syndrome" as well as "Munchausen syndrome by proxy" had occurred with Deborah, and that a delusional disorder had resulted in Deborah. (Tr. R002436, R002438-39) Klaung further testified that he was "convinced within a reasonable degree of medical certainty" that Deborah and her parents were "delusional." (Tr. R002451).

Klaung recommended that the boys have no contact with their mother until she had undergone intensive psychotherapy, referencing Dr. Rossiter's report. (Tr. R002508). When shown that Dr. Rossiter's report recommended supervised visits, Klaung admitted that he misinterpreted the report. (Tr. R002509). However, he still did not agree with Dr. Rossiter's recommendation for supervised visitation. (Tr. R002541). Klaung stood by his opinion that there should not even be supervised visitation. (Tr. R002443-2444).

Klaung never spoke with Dr. Rossiter (Tr. R002487), nor Christopher's treating physician, Dr. Husain (Tr. R002505), nor Christopher's treating psychiatrist, Dr. Goslawski (Tr. R002506). Klaung had only taken six hours of courses on ethics (Tr.

R002411) and one course on the parental alienation syndrome (PAS). (Tr. R002412). He had not taken any courses on Munchausen's. (Tr. R002487). He was unaware of a parenting skills test called ASPECT, and thought it was a pain tolerance test. (Tr. R002536). When asked whether the MMPI-II was one of the top tests in the field of psychology, he answered, "I'm not qualified. I am not a clinical psychologist." (Tr. R002484). The trial court essentially adopted all of the opinions of Klaung, ordering sole custody to Lorenzo with no contact (not even supervised visitation) for Deborah. (Vol. 5 of 5, R. 0301013-1014).

At trial, Dr. Rossiter testified substantially in conformity with his report of June 10, 2005. He concluded Deborah and her parents were afflicted with a delusional disorder, parent alienation syndrome, and Munchausen's-by-proxy syndrome. While arriving at the conclusions regarding Munchausen's, Dr. Rossiter admitted that he had only dealt with one or two such cases. (Tr. R002751)

Dr. Allen M. Jaffee, Psy.D., Professor of Psychiatry at Northwestern University School of Medicine for the last 25 years (Tr. R003113-3114), also testified. He had administered the MMPI-II test to Deborah in October 2006. (Tr. R003120) According to Dr. Jaffee, the was a reliable test for psychological assessment. (Tr. R003114)

Dr. Rossiter's appointment as a Section 5/605 investigator authorized him to have psychological tests performed on the parties or children. However, he did not do so (Tr. R002789). Dr Husain was a treating internist of Christopher for a year and a half prior to the time that Dr. Rossiter completed his report, but Dr. Rossiter never spoke to him. (Tr.

R002814-2815) Dr. Goslawski was Christopher's psychiatrist for that same time (Tr. R002817), but Dr. Rossiter never spoke to him, either. (Tr. R002820)

Dr. Rossiter thought that the MMPI-II test was a test of 350 or maybe 250 questions, and that a person could be coached to achieve better results. (Tr. R003035) Dr. Jaffee testified to the contrary, that the MMPI-II was a test of 567 questions and never had as few as only 350 (Tr. R003115), and that coaching could not affect the results. (Tr. R003115) One of the test scales looks specifically for an indication of Munchausen's, as indicated by an elevated score. Deborah's score was not elevated. (Tr. R003136)

When asked about the ASPECT test, Dr. Rossiter had only a general idea of what it was. (Tr. R002855) Dr. Jaffee explained that ASPECT was the Ackerman Schoendorf Parenting Effectiveness for Custody Test that he administered to Deborah. (Tr. R003153). In the field of psychiatry, ASPECT is considered very reliable. (Tr. R003156-3157). The results for Deborah were at a high level in terms of her ability to parent. (Tr. R003157).

Dr. Rossiter spent no time with Deborah's father and only "some period of time" with Deborah's mother, but he concluded that all three had delusional beliefs. (Tr. R002829-2830) Dr. Jaffe thought that Dr. Rossiter's arriving at that conclusion after a 30 minute conversation was "outrageous." (Tr. R003143) He also thought that it was unethical for Dr. Rossiter not to disclose in his report that he had met with Lorenzo's wife, Laurie, on two occasions prior to his being appointed as Section 5/605 evaluator. (Tr. R003141)

ARGUMENT

I. THE APPELLATE COURT'S RIGID APPLICATION OF THE DEADLINE TO FILE A PETITION FOR LEAVE TO APPEAL UNDER SUPREME COURT RULE 306(b)(1) WAS UNCONSTITUTIONAL AS APPLIED TO DEBORAH.

In the Rule 23 Order, the appellate court dismissed Deborah's argument that the emergency order of protection (EOP), improperly entered against her on June 15, 2005 and extended 30 times thereafter, tainted the outcome of the June 2007 custody proceeding. Deborah had no contact with her sons for two years prior to the later hearing. The appellate court noted that the trial court entered an order granting Lorenzo's emergency petition for change of custody on the same day that it entered the EOP, and the temporary custody order specified that Deborah was to have no contact with Jonathan and that visitation with Christopher was denied pursuant to the EOP. The appellate court further noted that another "no contact" order was entered when the EOP was vacated on December 12, 2006, and, therefore, Deborah "still would not have had visitation with her children." (App. A000286-287)

Deborah argued on appeal that the circuit court erred in granting Lorenzo's emergency petition for temporary change of custody on June 15, 2005, with a "no contact" order being entered, without the requisite findings to support such an order, without providing Deborah the investigator's report ten (10) days prior to the "hearing," and without providing Deborah a hearing on custody, thus, also tainting the subsequent hearing in. June 2007. (App. A000287-289). However, the appellate court in cursory fashion

dismissed the heart of Deborah's argument—that the patent violation of her due process .rights on June 15, 2005 tainted the outcome of the final custody proceeding in 2007. The appellate court stated: "We need not reach the merits of this argument." (App. A000288).

The appellate court rested its conclusion on the fact that S.Ct. Rule 306(b)(1) required that a petition for leave to appeal an order affecting the care and custody of unemancipated minors must be filed within five (5) business days of the entry of the order, and that Deborah failed meet that deadline. Deborah submits that the rigid application of Rule 306(b)(1) was unconstitutional as applied to her. This constitutional issue arose for the first time in and as a result of the appellate court making that ruling; thus, providing as a matter of right this appeal relative to the first point raised in this Petition.

In the alternative, leave to appeal the first point raised in this Petition should be allowed as a matter of judicial discretion, as the question presented in this appeal (i.e. the right to raise children) is of paramount importance and has been deemed an essential, basic civil right that is perhaps the oldest of the fundamental liberty interests. Additionally, there is a need for the exercise of this Court's authority to interpret one of its S.Ct. Rules.

A. Deborah has a Fundamental Liberty Right in the Care and Custody of Her Children.

Courts in the United States have long recognized parents' fundamental right to the care, custody and control of their children: "The liberty interest . . . of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental

liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Earlier, in *May v. Anderson*, 345 U.S. 528, 533 (1953), which involved a dispute between a divorced couple over child custody, the U.S. Supreme Court described the rights of a mother "to the care, custody, management and companionship of her minor children" as "[r]ights far more precious *** than property rights." The right to conceive and to raise children has been deemed "essential." *Stanley v. Illinois*, 405 U.S. 645, 651 (1972), *citing Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), and has been deemed a "basic civil right of man." *Stanley*, 405 U.S. at 651, *citing Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

"The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment (*Meyer*, 262 U.S. at 399), the Equal Protection Clause of the Fourteenth Amendment, (*Skinner* 316 U.S. at 541), and the Ninth Amendment (*Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring))." *Stanley*, 405 U.S. at 651.

In this case, Deborah's liberty interests with respect to her care, treatment and custody of Christopher and Jonathan are fundamental liberty rights that are afforded constitutional due process protections.

B. Illinois Supreme Court Rule 306(b)(1) Is Unconstitutional "As Applied" to Deborah, As It Interfered With Her Fundamental Liberty Right in the Care and Custody of Her Children.

An "as applied" constitutional challenge requires a plaintiff to show the statute violates the constitution as it applies to her. *Russell v. Blagojevich*, 367 Ill.App.3d 530, 534 (4th Dist. 2006), *citing, People v.*

Garvin, 219 Ill.2d 104, 117 (2006). A party raising an "as-applied" challenge need only show that, although the law may be constitutionally applied in most circumstances, it was specifically applied to her in an unconstitutional manner. *Garvin*, 219 Ill.2d at 117.

An analogous case is *Lulay v. Lulay*, 193 Ill.2d 455 (2000), in which this Court found section 607(b) (1) of the Illinois Marriage and Dissolution of Marriage Act unconstitutional as applied to the facts of that case, as it was an unconstitutional infringement on the parents' fundamental liberty interest in raising their children. 193 Ill.2d at 479-80.

Looking at the specific facts of this case, S.Ct. Rule 306(b) is unconstitutional as applied to Deborah, as it infringed on her fundamental liberty interest in the care and custody of her children.

On June 15, 2005, the trial court granted Lorenzo's emergency petition for a temporary change of custody, further providing that there be "no contact" with Deborah, even though she had been the children's primary caretaker since their births. Pursuant to S.Ct. Rule 306(a)(5), Deborah was permitted to file a petition for leave to appeal the temporary change of custody and the no contact order. The timing in which to file her petition was governed by S.Ct. Rule 306(b)(1) which provides, in relevant part: "The petition, supporting record and the petitioner's legal memorandum, if any, shall be filed in the appellate court within five business days of the entry or denial of the order from which review is being sought..." Thus, pursuant to S.Ct. Rule 306(b)(1), Deborah's petition for leave to appeal was to be filed in the appellate court on or before June 22, 2005. However, Deborah's counsel, Mr. Alex Abate, failed to timely perfect the appeal.

Instead, on June 22, 2005 - the day the petition for leave to appeal was due--Mr. Abate served Deborah with his Motion to Withdraw as Deborah's counsel. One week after the appeal deadline--on June 29, 2005--Mr. Abate filed his Motion to Withdraw, which the trial court granted on that same day.

In granting Lorenzo's emergency petition for a temporary change in custody and entering the no contact order, the circuit court clearly erred in taking Deborah's children away without any notice, hearing or findings whatsoever. Even the appellate court noted that no testimony or evidence was taken at the June 15, 2005 "hearing." (App. A000271). Fundamental fairness dictates the statement of Deborah's right to appeal the order and its resulting impact on the June 2007 hearing, as such a rigid application of S.Ct. Rule 306(b)(1) is unconstitutional as applied to Deborah under these circumstances.

C. Other Jurisdictions Have Created A "Fundamental Fairness" Exception To A Litigant's Failure to Timely Perfect An Appeal.

In *State v. Ortiz*, the Supreme Court of Kansas, in the interest of fundamental fairness, recognized an exception to the rule (conferring jurisdiction on the appellate court only if a timely appeal is perfected) where a criminal defendant either was not informed of his right to appeal, or whose attorney failed to perfect and complete an appeal. 230 Kan. 733, 736 (Kan. 1982).

Years later, the court in. *In re T.M.C.* extended the fundamental fairness exception as explained in *Ortiz* to civil proceedings - **specifically to civil proceedings involving the termination of parental**

rights. 26 Kan.App.2d 297, 299 (Kan.App. 1999). The court stated: "It is well-settled that basic parental rights are fundamental rights protected by the Fourteenth Amendment," and the court held "**we conclude it is proper to apply the fundamental fairness exception to an untimely appeal from a termination order.**" *Id.*, at 299 (emphasis added).

In *State v. Johnson*, the Supreme Court of Utah held that an attorney's failure to perfect an appeal was grounds for allowing the appellate court to take jurisdiction over what would otherwise have been an untimely appeal. 635 P.2d 36, 38 (Utah 1981). Thereafter, in *Manning v. State*, the Utah Supreme Court set forth circumstances in which the court could reinstate the time frame for filing an appeal. 122 P.3d 628, 636 (Utah 2005). One such circum-stance is where "the court or the defendant's attorney failed to properly advise defendant of the right to appeal." *Id.*, at 636. The *Manning* court concluded that "**the right to appeal may then be restored if it is in the interest of fundamental fairness to do so.**" *Id.*, at 639 (emphasis added).

In *Esters v. State*, the Alabama appellate court held that under the Rules of Professional Conduct a withdrawing attorney must take steps to protect the client's interests, and the attorney's failure to timely file an appeal was grounds for allowing the appellate court to take jurisdiction over the appeal. 894 So.2d 755, 762 (Ala.Crim.App. 2003).

In *Bryant v. State,* the Supreme Court of Arkansas set forth two possible grounds for allowing the filing of an untimely appeal, where "either the party or attorney filing the appeal is at fault, or there is good reason that the appeal was not timely perfected." 362 Ark. 167, 168 (Ark. 2005). In *Bryant*, the attorney

filed a motion in which he "candidly admitted fault," and therefore the court allowed the untimely appeal. *Id.*, at 168.

Similarly, in the case at hand, Deborah was not informed of her right to appeal, and her attorney failed to perfect and complete an appeal, or advise her of the 5-day deadline in which to file an appeal. Instead, Deborah's attorney served her with his motion to withdraw on the same day that her interlocutory appeal was due to be filed. This Court should apply the fundamental fairness doctrine, which dictates the reinstatement of Deborah's right to appeal the circuit court's erroneous deprivation of her liberty right to care for her children. Deborah's constitutional, parental rights should not be forfeited due solely to her attorney's fault in failing to timely perfect an appeal.

D. Illinois Courts Have Made Exceptions to the Rigid Adherence to Deadlines, Especially Deadlines Imposed by Supreme Court Rules.

It is well-settled that the Illinois Supreme Court has the power to make and interpret its own rules. *Swain v. Hoberg*, 380 Ill. 442, 445 (1942); *see also*, 735 ILLS 5/1-104 ("The Supreme Court of this State has power to make rules of pleading, practice and procedure for the circuit, Appellate and Supreme Courts . . ."). Illinois Courts have recognized fundamental fairness exceptions to the rigid adherence to deadlines.

Recently this Court in *Vision Point of Sale, Inc. v. Haas* has relaxed the previously rigid approach for a party's delinquency in complying with requests to admit facts, under S.Ct. Rule 216, stating that the

trial court could consider "all objective, relevant evidence presented by the delinquent party" and "may receive evidence with respect to whether the party's original delinquency was caused by mistake, take, inadvertence, or attorney neglect. . . ." 226 Ill.2d 334, 353 (2007).

In this instance, following *Vision Point*, this Court should look to all objective relevant evidence as to why Deborah failed to perfect her appeal within the five (5) business day deadline proscribed by S.Ct. Rule 306(b)(1). Of significance, Deborah's attorney, Mr. Abate, withdrew leaving her without the benefit of counsel, and Deborah had no knowledge of the 5-day deadline to file her petition for leave to appeal the custody order.

In this case, Deborah would be deprived of a constitutional liberty right to the care and custody of her children, through no fault of her own, where the circuit court patently failed to follow any of the statutory requirements for the entry of the orders, and where Deborah's withdrawing attorney failed to timely perfect an appeal of that erroneous order. It is unlikely that this Court meant for such a harsh result to occur by a rigid application to one of its procedural Rules. This Court should interpret S.Ct. Rule 306(b) to allow for an untimely appeal in circumstances, such as these, where fundamental fairness dictates a discretionary exception to the Rule.

The appellate court has the power to allow a late notice of appeal in criminal cases. *People v. Golden,* 369 Ill.App.3d 639, 645 (2nd Dist. 2006). A late notice of appeal may be filed in a criminal case in Illinois "to promote the concept of fundamental fairness." *People v. Perez*, 115 Ill.App.3d 446, 451 (1st Dist. 1983). Just

as the Kansas Supreme Court did in *In re T.M.C.*, this Court should also extend the fundamental fairness exception to civil proceedings involving the termination of constitutionally protected parental rights. The right to a criminal appeal and the right to the care and custody of children are both constitutionally protected rights. The public policy behind a fundamental fairness exception to allowing a late appeal in both cases is the same, as they both involve the deprivation of constitutional rights. There is no sound policy reason why a late appeal is allowed to preserve a criminal defendant's constitutional rights, but is not allowed in a civil case involving the termination of constitutionally protected parental rights.

II. THE APPELLATE COURT OVERLOOKED AND MISAPPREHENDED CERTAIN EVIDENCE THAT RENDERS THE UNDERLYING JUDGMENT GRANTING A CHANGE OF CUSTODY AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

The appellate court held that the trial court's decision to modify custody was not against the manifest weight of evidence. (App. A000299) The appellate court fairly described the circumstances surrounding the June 15, 2005, "hearing"—where Deborah had custody of her children taken from her and ordered to have no visitation with them, on the basis of a written report which she was allowed to see just minutes before and where "no testimony or other evidence was taken." (App. A000271) However, the appellate court ruled that, "since Deborah did not perfect an interlocutory appeal from the temporary custody order and a final custody hearing has been held, **any denial of Deborah's due process** would

not justify reversal of the final custody order." (App. A000288-289) [Emphasis added.] That reasoning simply misses the point of Deborah's argument. The denial of Deborah's due process, by granting temporary custody to Lorenzo in June 2005 without a hearing and by the simultaneous imposition of a no contact order which lasted two years, tainted the final custody hearing in 2007.

The appellate court addressed that argument earlier in the Rule 23 Order saying, "We need not reach the merits of this argument. Even if the trial court [in June 2005] erred in granting Lorenzo's petition for temporary change of custody, it would not warrant the reversal of the trial court's June 20, 2007, custody determination," citing *In re Marriage of Gordon*, 233 Ill. App. 3d 617, 642-644 (1992). (App. A000288) However, *Gordon* is clearly distinguishable in that there was no allegation therein that the temporary order in any way tainted the final determination. The fact that the June 2005 order was never timely appealed by Deborah's attorney cannot simply erase the impact of that order on the proceedings in June 2007.

The appellate court noted that "[a] custody determination, in particular, is afforded `great deference' because 'the trial court is in a superior position to judge the credibility of the witnesses and determine the best interests of the child,'" citing *Bates*, 212 Ill. 2d at 516. (App. A000290) While that is true as a general rule, this is the same trial court that abused its discretion—the most deferential standard of review (*In re D.T.*, 212 Ill.2d 347, 356 (2004))—in denying any visitation to Deborah. (App. A000301)

The appellate court also overlooked the fact that Deborah was the primary caretaker of the children

from their births until the trial court took them away from her in June 2005, and that there is a "legislative presumption" in favor of the custodial parent. *(In re Marriage of Elden*, 158 Ill. App. 3d 798, 805 (3' Dist. 1987)) The appellate court stated: "Moreover, once the trial court enters a final custody order, an assumption arises that the trial court has adjusted for any inequity in its temporary orders," citing *In re Marriage of Fields*, 283 Ill. App. 3d 894, 901 (1996). (App. A000288) However, Deborah is not arguing an "inequity" herein, but rather a manifest injustice. How does a court adjust for depriving a parent of contact with her children for two years? Surely, this Court could not have meant for such a harsh result in the application and interpretation of this Court's Rules.

With respect to the best interest factors, particularly the child's wishes, much is made of the circuit court's interview with Christopher in 2007. Therein, the boy painted a negative picture of his mother, but the appellate court overlooked the fact that the interview occurred after two years of no contact with his mother, while living with his father and with the continued "counseling" of Brian Klaung, his father's hired agent. In 2004 (prior to Klaung's "counseling"), in another court interview, Christopher had nothing but good things to say about Deborah. There is no denying that the boys were often exposed to the turmoil that existed between their parents before the June 2005 "hearing." What the appellate court fails to appreciate is that there was no turmoil to be observed in the two years preceding the June 2007 hearing because one of their parents had been removed from their lives. Things had to seem better.

As to the factor of interaction and the interrelationship with their parents, the appellate court noted that "the trial court found that the testimony reflected that the children had a good relationship with their father and stepmother" at the time of the hearing in 2007 (App. A000281) While that might be true, it ignores the fact that there was absolutely no relationship with their mother for the previous two years.

As to the factor of the willingness and ability of each parent to facilitate and encourage a close and continuing relationship, the appellate court noted that "the trial court determined that if custody was returned to Deborah, she would not facilitate a close and continuing relationship between the children and Lorenzo." (App. A000283) While Deborah takes issue with that finding, the appellate court is ignoring the fact that Lorenzo, at the June 2005 "hearing," successfully kept Deborah from having any relationship with her children for the next two years and convinced the trial judge, at the 2007 hearing, to keep that order in effect.

With respect to the testimony of Brian Klaung, the appellate court overlooked his obvious bias. During the entire two years of his involvement with the case, Klaung never contacted or attempted to interview Deborah because "she was not my client." After being hired by Lorenzo, and based on only one meeting with the boys and one meeting with Lorenzo and his wife, and without having read Dr. Rossiter's report, Klaung (a clinical social worker) came to the conclusion that Deborah and her parents should have no contact with her children, as Klaung was "convinced within a reasonable degree of **medical** certainty that

Deborah and her parents were delusional." (emphasis added) (Tr. R002451)

The appellate court overlooked the fact that Klaung misinterpreted Dr. Rossiter's report regarding visitation, that he never spoke with Dr. Rossiter, or Christopher's treating physician or treating psychiatrist, that he had only taken one course on parental alienation syndrome and no courses on Munchausen's, and that he thought that the parenting skills test, ASPECT, was a pain tolerance test. When asked a question about the test, he answered, "I'm not qualified. I am not a clinical psychologist."

The appellate court acknowledged: "Deborah argues that the trial court erred in' relying on Klaung's testimony because Klaung was unqualified to diagnose mental illness. We agree that because Klaung was not a psychiatrist, he was not qualified to render a medical diagnosis. [Cite omitted.]" (App. A000298) However, the appellate court went on to say, "Nonetheless, Klaung's testimony was relevant to the boys' mental health, as based on his own observations of them." (App. A000298) Aside from his bias, the appellate court fails to note that Klaung's "observations" were routinely expressed in terms of an opinion and that his opinions were inextricably intertwined with his medical diagnoses. His testimony is totally based upon and colored by those diagnoses and should be disregarded in its entirety.

With respect to Dr. Rossiter, the appellate court overlooked the fact that he was testifying as to a situation that he perceived to exist approximately two years before the hearing in 2007. And, Dr. Rossiter further admitted that he had only dealt with one or two Munchausen's cases, that he never had

the testing performed on the parties that he was authorized to do, that he thought the MMPI-II was a test of 350 or maybe 250 questions and a person could be coached to achieve better results on it, that he had only a general idea about the ASPECT' test, that he spent no time with Deborah's father and only "some period of time" with Deborah's mother but concluded that all three had delusional beliefs, and that he never spoke with Christopher's treating internist, Dr. Hussain, or Christopher's treating psychiatrist, Dr. Goslawski.

The appellate court stated that, contrary to Deborah's contention, "the trial court did consider Dr. Jaffee's testimony and found it credible." (App. A000298) That seems overstated, as Dr. Jaffee countered Dr. Rossiter on many points. For instance, the appellate court seems to overlook Dr. Jaffee's testimony that the MMPI-II was most reliable psychological test, with 567 questions, never with as few as 350, that a person could not be coached as to its results, that Deborah's results on it did not indicate Munchausen's, and that he felt that Dr. Rossiter's conclusion that Deborah's parents suffered from delusional beliefs after a 30-minute conversation was "outrageous" and that Dr. Rossiter's failure to disclose his two contacts with Lorenzo's wife prior to his court appointment was "unethical." Perhaps, one of the most important failings of Dr. Rossiter was his failure to possess the knowledge to realize that the ASPECT test of October 2006 indicated that Deborah possessed good parenting skills.

Deborah submits that if this Court factors in some of the overlooked and misapprehended evidence and arguments, it must conclude that Deborah's evidence is so "strong and convincing" as to completely over-

come the evidence and presumptions, if any, that exist in favor of Lorenzo, and fin d that the appellate court erred in finding that the trial court's decision on custody was not against the manifest weight of evidence. *Dizney v. Witt*, 26 Ill.App.3d 45, 49 (2nd Dist. 1975) In summary, "what occurred in this case cannot be approved." See, *In re Marriage of Gordon, supra*, at p. 665.

Leave to appeal the second point raised in this Petition should be allowed as a matter of judicial discretion, as the question presented in this appeal (i.e. the right to raise children) is of paramount importance and has been deemed an essential, basic civil right that is perhaps the oldest of the fundamental liberty interests.

Respectfully submitted,
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SUPREME COURT OF ILLINOIS
CLERK OF THE COURT

April 9, 2008

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No. 106234 -Deborah Orlando Cooney, petitioner, v. Lorenzo Orlando, respondent. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on May 14, 2008.

ILLINOIS SUPEME COURT RULES
(Refs & Annos)
Article III. Civil Appeals Rules (Refs & Annos)
Part A. Appeals from the Circuit Court

Rule 306. Appeals from Orders of the Circuit Court Granting New Trials and Granting or Denying Certain Motions

(a) Orders Appealable by Petition. A party may petition for leave to appeal to the Appellate Court from the following orders of the trial court:

(1) from an order of the circuit court granting a new trial;

(2) from an order of the circuit court allowing or denying a motion to dismiss on the grounds of *forum non conveniens*, or from an order of the circuit court allowing or denying a motion to transfer a case to another county within this State on such grounds;

(3) from an order of the circuit court denying a motion to dismiss on the grounds that the defendant has done nothing which would subject defendant to the jurisdiction of the Illinois courts;

(4) from an order of the circuit court granting or denying a motion for a transfer of venue based on the assertion that the defendant is not a resident of the county in which the action was commenced, and no other legitimate basis for venue in that county has been offered by the plaintiff;

(5) from interlocutory orders affecting the care and custody of unemancipated minors, if the appeal of such orders is not otherwise specifically provided for elsewhere in these rules;

(6) from an order of the circuit court which remands the proceeding for a hearing de novo before an administrative agency; or

(7) from an order of the circuit court granting a motion to disqualify the attorney for any party;

(8) from an order of the circuit court denying or granting certification of a class action under section 2-802 of the Code of Civil Procedure (735 ILCS 5/2-802).

If the petition for leave to appeal an order granting a new trial is granted, all rulings of the trial court on the posttrial motions are before the reviewing court without the necessity of a cross-petition.

(b) Procedure for Petitions. The procedure for petitions for leave to appeal orders under paragraph (a)(5) shall be as provided in this paragraph (b). The procedure for petitions for leave to appeal other orders under paragraph (a) shall be provided in paragraphs (c) through (i).

(1) *Petition; Service; Record.* Unless another form is ordered by the Appellate Court, review of an order affecting the care and custody of an unemancipated minor as authorized in paragraph (a)(5) shall be by petition filed in the Appellate Court. A notice of interlocutory appeal substantially conforming to the notice of appeal in other cases shall also be filed within the time allowed by this paragraph for filing the petition. The petition shall be in writing and shall state the relief requested and the grounds for the relief requested. An appropriate supporting record shall accompany the petition, which shall include the notice of interlocutory appeal, the order appealed from or the proposed order, and any supporting

documents or matters of record necessary to the petition. The supporting record must be authenticated by the certificate of the clerk of the trial court or by the affidavit of the attorney or party filing it. The petition, supporting record and the petitioner's legal memorandum, if any, shall be filed in the Appellate Court within five business days of the entry or denial of the order from which review is being sought, with proof of personal service or facsimile service as provided in Rule 11.

(2) *Legal Memoranda.* The petitioner may file a memorandum, not exceeding 15 typewritten pages, with the petition. The respondent or any other party or person entitled to be heard in the case may file, with proof of personal service or facsimile service as provided in Rule 11, a responding memorandum within five business days following service of the petition and petitioner's memorandum. A memorandum by the respondent or other party may not exceed 15 typewritten pages.

(3) *Replies; Extensions of Time.* Except by order of court, no replies will be allowed and no extension of time will be allowed.

(4) *Variations by Order of Court.* The Appellate Court may, if it deems it appropriate, order a different schedule, or order that no memoranda be filed, or order that other materials need not be filed. If the petition is allowed, the court may order the filing of such additional material from the trial court and the parties as may be necessary to a full determination of the case.

(c) Petition. The petition shall contain a statement of the facts of the case, supported by reference to the supporting record, and of the grounds for the appeal. An original and three copies of the petition (or original and five copies in workers' compensation cases arising under Rule 22(g)) shall be filed in the Appellate Court in accordance with the requirements for briefs within 30 days after the entry of the order. A supporting record conforming to the requirements of Rule 328 shall be filed with the petition.

(d) Answer. Any other party may file an original and three copies of an answer (or original and five copies in workers' compensation cases arising under Rule 22(g)) within 21 days of the filing of the petition, together with a supplementary supporting record conforming to Rule 328 consisting of any additional parts of the record the party desires to have considered by the Appellate Court. No reply will be received except by leave of court or a judge thereof.

(e) Appendix to Petition; Abstract. The petition shall include, as an appendix, a copy of the order appealed from, and of any opinion, memorandum, or findings of fact entered by the trial judge, and a table of contents of the record on appeal in the form provided in Rule 342(a). If the Appellate Court orders that an abstract of the record be filed, it shall be in the form set forth in Rule 342(b) and shall be filed within the time fixed in the order.

(f) Extensions of Time. The above time limits may be extended by the reviewing court or a judge thereof upon notice and motion, accompanied by an affidavit showing good cause, filed before expiration of the original or extended time.

(g) Stay; Notice of Allowance of Petition. If the petition is granted, the proceedings in the trial court are stayed. Upon good cause shown, the Appellate Court or a judge thereof may require the petitioner to file an appropriate bond. Within 48 hours after the granting of the petition, the clerk shall send notice thereof to the clerk of the circuit court.

(h) Additional Record. If leave to appeal is allowed, any party to the appeal may request that additional portions of the record on appeal be prepared as provided in Rule 321 *et seq.*, or the court may order the appellant to file the record, which shall be filed within 35 days of the date on which such leave was allowed. The filing of an additional record shall not affect the time for filing briefs under this rule.

(i) Briefs. A party may allow his or her petition or answer to stand as his or her brief or may file a further brief in lieu of or in addition thereto. If a party elects to allow a petition or answer to stand as a brief, he or she must notify the other parties and the Clerk of the Appellate Court on or before the due date of the brief and supply the court with the requisite number of briefs required by Rule 341(e). If the appellant elects to file a further brief, it must be filed within 35 days from the date on which leave to appeal was granted. The appellant's brief, and other briefs if filed, shall conform to the schedule and requirements as provided in Rules 341 through 343. Oral argument may be requested as provided in Rule 352(a).

JUSTICE KILBRIDE, dissenting [December 31, 2002 amendment]:

I respectfully dissent from the majority's December 31, 2002, amendment to Supreme Court Rule 306,

allowing discretionary appeals of circuit court orders denying or granting certification of a class action. I do not, however, make any comment on the merits of the amendment. I dissent solely on the procedural basis that we acted prematurely by adopting the rule change without sending the proposed amendment to our own Rules Committee.

Supreme Court Rule 3 (188 Ill. 2d R. 3) provides the procedures for adopting new rules or amending existing rules of the Supreme Court. Subsection (a) sets forth the stated purpose of Rule 3:

> "These procedures are adopted to provide for the orderly and timely review of proposed rules and proposed amendments to existing rules of the Supreme Court; to provide an opportunity for comments and suggestions by the public, the bench, and the bar; to aid the Supreme Court in discharging its rulemaking responsibilities; to make public record of all such proposals; and to provide for public access to an annual report concerning such proposals." 188 Ill. 2d R. 3(a).

While this court has reserved the prerogative of departing from the procedures set forth in Rule 3 (188 Ill. 2d R. 3(b)), I do not believe the majority has shown any necessity for departing from our standard rulemaking process in this matter.

For well-intentioned reasons, the majority deemed it appropriate to bypass our customary rulemaking procedure of referring proposed amendments to the Rules Committee. To justify this abbreviated amendment procedure, the majority would likely explain that the rule is harmless, applying equally to plaintiffs and defendants, and simply follows the federal rule. Although that rationale and other reason-

able rationales may be correct, the adoption of the amendment without public notice, comment, and thoughtful deliberations by our Rules Committee runs afoul of our established rulemaking process for litigation matters. This amendment is not merely an administrative rule; rather, it is a rule directly affecting the course of litigation. In matters of litigation, our practice has been, and should continue to be, one of seeking comment from trial practitioners, trial court judges, and the public prior to the adoption of new rules and amendments.

In this instance, we received a proposal from a proponent and, almost immediately, adopted the proposal without any comment by other interested parties. The proposal shou'd have first been submitted to the Rules Committer where it would have been forwarded to the appropriate committee for review and preparation of a recommendation. 188 Ill. 2d R. 3(c). If the committee recommended adopting the proposal, it would have been presented a the annual public hearing and submitted for public comment. 188 Ill. 2d R. 3(c)(1)(B), Administrative Order M.R. No. 10549(a)(1). Each committee then would have had 21 days to respond to any public comment (Administrative Order, M.R. No. 10549(a)(4), (5)) prior to the submission of the Rules Committee's annual re port (188 Ill. 2d R. 3(c)(3)). I believe this longstanding procedure is an indispensable tool that should have bee] used before this court adopted the amendment to Rule 306.

I also note that the substance of the amendment was previously the subject of much legislative review and debate. Recently, various legislative bills have proposed deleting all existing class action provisions in the Code o Civil Procedure (735 ILCS 5/2-801 *et seq.* (West 2002)) and inserting new ones, including pro-

visions governing the appeal of class certification orders. 92nd Ill. Gen. Assem., Senate Bill 1127, Senate Bill 1320, 1991-199: Sess. Therefore, in light of the legislative history of this matter, I believe that it was error for this court to act without public deliberations. As this court's official liaison to the Rules Committee, I respectfully and strongly dissent to this court's departure from the established rule amendment procedures in this instance.

CREDIT(S)

Amended October 21, 1969, effective January 1, 1970, and amended effective September 1, 1974; amended Jul; 30, 1979, effective October 15, 1979; amended February 19, 1982, effective April 1, 1982; amended May 1982, effective July 1, 1982; amended June 15, 1982, effective July 1, 1982; amended August 9, 1983, effective October 1, 1983; amended September 16, 1983, effective October 1, 1983; amended December 17, 1993, effective February 1, 1994; amended March 26, 1996, effective immediately; amended December 31, 2002, effective January 1, 2003; amended December 5, 2003, effective January 1, 2004; amended May 24, 2006, effective September 1, 2006.

FormerlyIll.Rev.Stat.1991, ch. 110A, ¶ 306.

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